Supreme Court, U.S.
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No.

IN THE

Supreme Court of the United States

WETLANDS ACTION NETWORK, *et al.*,
Petitioners,

v.

U.S. ARMY CORPS OF ENGINEERS, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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PETITION FOR A WRIT OF CERTIORARI

Bruce J. Terris*
(**Counsel of Record*)
Kevin O. Leske
TERRIS, PRAVLIK & MILLIAN, LLP
1121 12th Street, N.W.
Washington, D.C. 20005
(202) 682-2100
Counsel for Petitioners Wetlands Action Network and California Public Interest Research Group

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QUESTION PRESENTED

Whether the decision of the court of appeals upholding the Corps of Engineers' decision not to prepare an Environmental Impact Statement under the National Environmental Policy Act was erroneous because the court of appeals determined, contrary to decisions of this Court and other circuits, that the Corps did not need to consider, in making this determination, significant environmental impacts that will be caused by portions of the same project which are outside the Corps' regulatory jurisdiction.

PARTIES TO THE PROCEEDING

Petitioners are Wetlands Action Network, a California non-profit corporation; and California Public Interest Research Group, a California non-profit corporation. Neither corporation has a parent or publicly held company owning 10% or more of the corporation's stock.

Ballona Wetlands Land Trust, a California non-profit corporation, was also a plaintiff in the proceedings below. It does not have a parent or publicly held company owning 10% or more of the corporation's stock.

Respondents are the United States Army Corps of Engineers, an agency of the United States; Lt. General Joe N. Ballard, in his capacity as Chief Engineer of the United States Army Corps of Engineers; Col. Michal R. Robinson, in his capacity as District Engineer of the United States Corps of Engineers; and Playa Capital Company, L.L.C.

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PETITION FOR A WRIT OF CERTIORARI

Wetlands Action Network and California Public Interest Research Group respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit.

OPINIONS BELOW

The opinion of the court of appeals is published at 222 F.3d 1105 (9th Cir. 2000) and is reprinted in the Appendix ("App.") at 1a. The decision of the district court, which is unpublished, is reprinted in the Appendix at 39a.

JURISDICTION

The judgment of the court of appeals was entered on August 21, 2000 (App. 1a). The petition for rehearing and rehearing en banc was denied on January 10, 2001 (App. 38a). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

On March 30, 2001, Justice O'Connor extended the time within which to file a petition for a writ of certiorari to and including May 10, 2001.

STATUTES INVOLVED

The relevant section of the National Environmental Policy Act ("NEPA"), 42 U.S.C. 4321 *et seq.*, is as follows:

Section 4322.

The Congress authorizes and directs that, to the fullest extent possible:

* * *

(2) all agencies of the Federal Government shall-

* * *

(C) include in every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment, a detailed statement by the responsible official on -

(i) the environmental impact of the proposed action,

(ii) any adverse environmental effects which cannot be avoided should the proposal be implemented,

(iii) alternatives to the proposed action,

(iv) the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity, and

(v) any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented.

The relevant regulations of the Council on Environmental Quality, 40 C.F.R. 1500 *et seq.*, are set forth in the Appendix at 93a.

STATEMENT OF THE CASE

The Ballona wetlands ecosystem is one of only a few significant wetlands that remain on the southern California coastline and contains one of the last major coastal wetland areas in Los Angeles County. 2 AR 722.[1/] The Ballona wetlands offer one of the last prime opportunities for coastal salt marsh restoration in southern California. 6 AR 2919.

The Playa Vista development ("Project") is one of the

[1/] All references to the Administrative Record are designated as "_ AR __."

largest commercial and residential developments ever undertaken in the City of Los Angeles. The developer, Maguire Thomas Partners-Playa Vista, LLC ("MTP-PV "),[2/] plans to construct a mixed-use development covering over 1000 acres that will include residential areas, a marina, hotels, retail establishments, and an entertainment media and technology district. 8 AR 3726. The Playa Vista property is the largest parcel of undeveloped land still remaining in the heavily urbanized western portion of Los Angeles County. 8 AR 3750.

For planning purposes, the project was divided into four parcels (Areas A, B, C, and D). 8 AR 3726. These parcels are divided on their easterly-westerly axis by the Ballona Creek and by Lincoln Boulevard on their northerly-southerly axis. *Ibid.* MTP-PV intends to build the project in three phases. 8 AR 3728. This massive project depends, to a significant extent, on the filling of coastal wetlands in Phase I for the purpose of constructing a drainage and detention system for storm water control and for flood protection for upland areas. The system would also serve as mitigation for the impacts on wetlands in other areas of the project. 8 AR 3729.

Phase I of the project involves the development of approximately 5,000,000 square feet of office space, 10,000 residential units, 1,000 hotel rooms and 600,000 square feet of retail space. 6 AR 2966. In August 1990, MTP-PV applied to the United States Army Corps of Engineers ("Corps") for a permit under Section 404 of the Clean Water Act, 33 U.S.C. 1344. MTP-PV applied to the Corps for a permit for Phase I in

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[2/]Playa Capital Company, L.L.C. is the successor-in-interest to MTP-PV, and is the owner of the property upon which the Playa Vista project is proposed. For the purposes of this petition, petitioners will refer to the developer as MTP-PV because that is how the developer is referred to in the decisions below.

order to (1) fill approximately 8 acres of wetlands in Area B and approximately 8 acres of scattered wetlands within Areas B, C and D, which would result in the combined destruction of approximately 16 acres of wetlands; and (2) build a proposed 51.1 acre pollution run-off and detention system[3/] as mitigation for the 28.1 acres of wetlands that would be filled during all phases of the project. 8 AR 3728-3729. Separate applications were to be made to the Corps for permits to fill wetlands in each of the following two phases. 8 AR 3728.

The 16 acres of wetlands that MTP-PV intends to fill in Phase I are coastal wetlands or salt water marshes. 1 AR 11; 2 AR 946; 6 AR 2937. MTP-PV intends to fill these coastal wetlands for two reasons: (1) the 8 acres of scattered wetlands in Areas B, C, and D would be filled to "accommodate" the mixed-use development (8 AR 3728); and (2) the 8 acres of wetlands in Area B would be filled in order to create a berm between the 51.1 acre pollution detention basin along Lincoln Boulevard, which is proposed in Phase I, and a salt water marsh extension, which is proposed in Phase II (8 AR 3729). The proposed pollution run-off and detention system in Phase I is designed for the purpose of collecting runoff from the new urban development inland of the existing tidal wetland. 8 AR 3728. Polluted storm water and urban runoff from the development and surrounding areas will be directed into the pollution detention basin through a new drainage channel that will be dug across the site. 8 AR 3730. The currently existing channel, which now contains functional wetlands, would be

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[3/]In the administrative record and during the course of this litigation, many terms have been used to refer to this proposed system, including: "retention basin"; "sump"; "freshwater marsh system"; "freshwater riparian system"; "freshwater mitigation system." For consistency, petitioners will refer to the entire system as the "pollution run-off and detention system" and the detention basin as the "pollution detention basin."

completely destroyed. 6 AR 2703; 8 AR 3728.

In Phase II of the Project, MTP-PV plans to create a 230-acre salt marsh system. 8 AR 3728. In order to do this, 160 acres of delineated wetlands, as well as upland areas, would be converted into a salt marsh system. 4 AR 1717. MTP-PV must obtain a permit from the Corps for this work.

Phase III requires the submission of a third permit application to the Corps. This phase proposes development of a marina in Area A, associated commercial and residential development, and possibly improvements to the Ballona Channel. 8 AR 3728. The plans for Phase III require the filling of 9.8 acres of wetlands in Area A. 2 AR 1718.[4/]

The wetlands involved in this case are of particular importance. The existing Ballona marsh ecosystem is an extremely scarce habitat in southern California because most coastal marshlands areas along the coast were destroyed long ago by urban development. Zedler Dec., paras. 2, 5; Mattoni Dec., para. 11. Coastal salt marsh is an endangered ecosystem in California. Zedler Dec., para. 2; 2 AR 722. Over 90% of the State's historic wetland areas have been destroyed. Zedler Dec., para. 3. Most of California's remaining coastal wetland habitat is in the northern half of the State. *Ibid.* Most of the remaining coastal wetland habitat is impaired, either through reduced tidal flushing, lowered water quality, and/or modified streamflows. *Ibid.*

Loss of habitat, including coastal salt marsh, is the leading cause of endangerment to species. Zedler Dec., para. 4. The loss of 90% of California's wetlands have reduced bird, fish,

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[4/]During the course of this litigation, the Corps decided that an EIS will be required for Phases II and III together.

invertebrate, and plant populations. *Ibid.* The threatened and endangered status of several species that depend on coastal wetland habitats can be attributed to both lost habitat and reduced habitat quality. *Ibid.* The Ballona wetlands that MTP-PV seeks to destroy support over 100 species of birds, including the endangered California Least Tern, the endangered Southwestern Willow Flycatcher and the state-endangered Belding's Savannah Sparrow. 6 AR 2621; 1 AR 11; Hanscom Dec., para. 3. There is an urgent need to restore tidally-influenced wetland habitat, rather than to destroy it, due to its importance in providing critical habitat. Zedler Dec., paras. 4-5. *See* 6 AR 2937; 1 AR 11; 2 AR 946.

While the Ballona wetlands are admittedly degraded (8 AR 3731), they can be successfully restored. Zedler Dec., para. 7. *See* 6 AR 2937; 6 AR 2919. Few of the remaining coastal wetlands in southern California present opportunities for expanding salt marsh area, which is typically accomplished either through restoring former wetlands or by excavating disturbed uplands and expanding the tidal influence. Zedler Dec., para 5. The Ballona wetlands presents both types of restoration opportunities. *Ibid.* It has areas with greatly reduced tidal flow that could be restored by increasing tidal influence and it has disturbed uplands that could be excavated and connected to tidal channels. *Ibid.* Moreover, the Ballona wetlands present an exceptional restoration opportunity because most wetlands in California are surrounded by permanent structures, such as buildings or other development. *Ibid.* The Ballona wetlands are an exception. *Ibid.*

Once the pollution run-off and detention system is constructed where the salt water marshes now exist, the future possibility of salt marsh restoration in this area will be permanently foreclosed. Zedler Dec., para 7; 7 AR 3365-3366; 6 AR 2937; 4 AR 1768. In addition, the construction of this

freshwater pollution run-off and detention system immediately adjacent to the remaining salt water wetlands will have serious detrimental impacts to these salt water wetlands. Zedler Dec., para. 7. Exotic plants (including non-indigenous weeds) from the new freshwater pollution run-off and detention system will likely establish themselves in the salt water wetlands and provide a nearby source of seeds for further invasion into these remaining salt marshes. *Id.*, para. 8. Urban run-off that will flow into the pollution run-off and detention system will likely allow contaminants to accumulate and enter the wetland food web and may alter ground water salinity that would encourage a non-indigenous plant invasion. *Ibid.*

MTP-PV proposed the pollution run-off and detention system as mitigation for the wetlands that will be destroyed during the entire project and has called it a freshwater wetland system. The pollution run-off and detention system proposed by MTP-PV does not mitigate the loss of the invaluable salt water wetlands. *See* 3 AR 1569-1570; 4 AR 1813-1815; 4 AR 1768; 4 AR 1792; 8 AR 3683. It is questionable whether the pollution detention system can even be referred to as a "marsh" or a "freshwater wetland." Mattoni Dec., para. 8; 6 AR 2937-2938. The system would be nothing more than a "storm drain and waste water disposal" device. *Ibid.*; 7 AR 3110. It was designed as a drainage and filtration plant for effluent and storm water, which will be created by the Playa Vista development, as well as other upstream urban development across its drainage area. Mattoni Dec., para. 8. It will be, in effect, a shallow lake with a surrounding weed patch that will be "unlikely to provide significant wildlife habitat values." *Ibid.* The "marsh" will promote at least 20 species of invasive non-native Mediterranean weeds and such noxious animal pests as Argentine ants, European earwigs and sowbugs. *Ibid.* These non-native species will preempt substantial habitat for native species that a true marsh is supposed to encourage. *Ibid.*

On July 1, 1992, the Corps issued the permit for Phase I along with an Environmental Assessment ("EA") and a Finding of No Significant Impact ("FONSI"). 8 AR 3725. On December 3, 1996, petitioner Wetlands Action Network,[5] as well as the Ballona Wetlands Land Trust, brought suit in the United States District Court for the Central District of California, challenging the Corps' determination to issue the permit and not to prepare an environmental impact statement ("EIS"). The action alleged violations of the National Environmental Policy Act and the Clean Water Act. Jurisdiction was invoked under 28 U.S.C. 1331.

The EA prepared by the Corps discussed the environmental impacts of the entire project. 8 AR 3725-3780. The EA stated that an EIS did not need to be prepared because "the fill proposed for 16 acres of degraded wetlands and U.S. waters for this immediate permit, and the nature of the proposed 51 acre freshwater wetland mitigation does not have sufficient impacts to warrant the preparation of an EIS." 8 AR 3769. The Corps did not consider the environmental impact or harm from any other portions of the project other than the filling of the wetland areas in determining not to prepare an EIS.

On June 26, 1998, the district court granted petitioners' motion for summary judgment. The court held that the decision by the Corps not to prepare an EIS was erroneous because the Corps did not analyze the entire project as functionally interdependent. App. 65a. The court found that "the fill of the wetlands as provided for under the Permit and the overall development on the Playa Vista property are inextricably intertwined, and are 'connected actions,' under applicable regulations." App. 65a. As a result, the court

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[5] Petitioner California Public Interest Research Group joined the action in an amended complaint filed on February 19, 1997.

ordered the Corps to rescind the permit for the filling of the 16.1 acres of wetlands and enjoined MTP-PV's construction activities relating to the 16.1 acres of wetlands. App. 92a.

On August 21, 2000, the Court of Appeals for the Ninth Circuit reversed. It held that the Corps did not need to consider the environmental harm caused by any portions of the development not within the regulatory jurisdiction of the Corps in determining whether to prepare an EIS. App. 24a. On January 10, 2001, the court of appeals denied a petition for rehearing and for rehearing en banc. App. 39a.

REASONS FOR GRANTING THE PETITION

Statutory Background. NEPA requires a federal agency to prepare an EIS for "all major Federal actions significantly affecting the quality of the human environment." 42 U.S.C. 4332(2)(C). The regulations of the Council on Environmental Quality state that NEPA "is our basic national charter for protection of the environment." 40 C.F.R. 1500.1(a). As this Court has found, NEPA emphasizes the importance of coherent and comprehensive up-front environmental analysis to ensure informed decision making so that "the agency will not act on incomplete information, only to regret its decision after it is too late to correct." *Marsh v. Oregon Natural Resources Council*, 490 U.S. 360, 371 (1989). NEPA's goals are "realized through a set of 'action-forcing' procedures" and require agencies to take a 'hard look' at the environmental consequences of their actions. *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 350 (1989).

It is well settled that when "the determination that a significant impact will or will not result from the proposed action is a close call, an EIS should be prepared." *National Audubon Soc'y v. Hoffman*, 132 F.3d 7, 13 (2d Cir. 1997). *See*

Save Our Ten Acres v. Kreger, 472 F.2d 463, 467 (5th Cir. 1973). Moreover, a party challenging an agency's decision not to prepare an EIS must show "only that there is a substantial possibility that the action may have a significant impact on the environment, not that it clearly will have such an impact." *National Audubon Soc'y v. Hoffman, supra,* 132 F.3d at 18.

The Council on Environmental Quality ("CEQ") has issued regulations to address whether an agency must prepare an EIS (40 C.F.R. 1501.4):

> In determining whether to prepare an environmental impact statement the Federal agency shall:
>
> * * *
>
> (c) Based on the environmental assessment make its determination whether to prepare an environmental impact statement.
>
> * * *
>
> (e) Prepare a finding of no significant impact (§ 1508.13), if the agency determines on the basis of the environmental assessment not to prepare a statement.

See Society Hill Towers Owners' Assn. v. Rendell, 210 F.3d 168, 174 (3rd Cir. 2000) (the "impact of a project upon the human environment is first assessed by preparation of an Environmental Assessment"); *C.A.R.E. Now, Inc. v. FAA*, 844 F.2d 1569, 1572 (11th Cir. 1988) (the EA "is an authorized tool for determining the extent of the environmental impacts").

If the EA demonstrates that the proposed action may have a significant impact, the agency must prepare an EIS. 42 U.S.C. 4332(2)(C); 40 C.F.R. 1508.9; *C.A.R.E. Now, Inc. v. F.A.A., supra,* 844 F.2d at 1572; *National Audubon Soc'y v. Hoffman, supra,* 132 F.3d at 12. On the other hand, if after preparing the EA, the agency determines that the proposed

action will not have any significant impacts, it can issue a Finding of No Significant Impact and forgo an EIS. 40 C.F.R 5101.4; 40 C.F.R. 1508.13; *Airport Neighbors Alliance v. United States*, 90 F.3d 426, 429 (10th Cir. 1996); *National Audubon Soc'y v. Hoffman, supra*, 132 F.3d at 12; *Sierra Club v. Epsy*, 38 F.3d 792, 796 (5th Cir. 1994).

The Environmental Assessment. The Corps prepared an EA in this case for the purpose of determining whether to prepare an EIS. 33 C.F.R. 230.10; 8 AR 3726. The EA first described the entire project and then described the activity to be carried out under the proposed permit. 8 AR 3728. The Corps recognized that the primary "purpose and need" for Phase I was both "to construct a mixed-use development" and "to provide mitigation for wetland impacts that will result from this and future Playa Vista projects." 8 AR 3730.

The Corps analyzed in the EA the impacts of the entire project and not just the filling of the wetlands.

First, the EA discussed changes in current, circulation or drainage patterns of the project. 8 AR 3735. The Corps found that "[o]verall, the whole project will result in an increase in impervious surfaces," which will result in a loss of groundwater recharge. *Ibid.* It noted that "[e]xisting waters of the U.S. and wetlands will be eliminated and new drainages and wetland areas will be created." *Ibid.*

Second, the EA examined the flood control effects of the entire project. 8 AR 3736. It expressed concern that "[i]f flood flows into the freshwater marsh exceed a one year event, excess fresh water will spill over the berm into the proposed [Phase II] salt marsh area." *Ibid.*

Third, the EA addressed the impacts on aquifer recharge

from the project as a whole. 8 AR 3737. It stated that "the increase in impervious surfaces that will result from the construction of the mixed-use development will reduce the natural recharge of the aquifer that occurs under present conditions." *Ibid.* The total site acreages with 100 percent impervious surfaces in the project would be increased from 443 to 870 acres. *Ibid.*

Fourth, the EA dealt with the effects of the entire project on habitat for fish and other aquatic organisms. 8 AR 3737-3740. The EA found that the total impacts to wetlands will approach 28 acres and that there would be a potential loss of amphibians and reptiles inhabiting the site. *Ibid.*

Fifth, the EA analyzed the effects of the entire project on the habitat for wildlife. It noted that there would be a "large loss of open space." 8 AR 3740. It also stated that the filling of the wetlands will result in a loss of eight acres of foraging habitat for grassland adapted bird species and loss of willow scrub habitat at the base of the Playa del Rey bluffs. *Ibid.*

Sixth, the EA set forth the harm to endangered and threatened species from the entire project. For example, it recognized that there might be "impacts to the Belding's Savannah Sparrow in Area A as a result of future phases of the Playa Vista project." 8 AR 3740.

Seventh, the EA analyzed the effect of the entire project on human use, including aesthetics, traffic, energy consumption, air quality and transportation. 8 AR 3742-3750. The most obvious impact was that the project would change the area from open space to a more urban environment and the "aesthetic changes will therefore be substantial." 8 AR 3743. The EA found that the project would generate increased traffic, would increase the demand for energy, and would bring thousands of

more people into the area. *Ibid.*

The EA included a three-page "Summary of secondary and cumulative effects." 8 AR 3750-3753. The EA recognized that the cumulative impacts of the project represent the loss of much of "the largest remaining open space within coastal West Los Angeles" and that the project would "replace approximately 484 acres of undeveloped open space with urban development." 8 AR 3750. The EA stated that the loss of this upland habitat is a "substantial impact which would be partially compensated for by the restoration and creation of sensitive habitat types" as part of the project. *Ibid.* It also found that, in addition to the loss of the upland habitat, the entire project would result in the loss of 17.9 acres of scattered wetlands and 6.2 acres of contiguous wetlands. *Ibid.* Furthermore, of 200 acres of native plant communities found in the entire project area, 38% would be destroyed and "there will be a fundamental change in the nature of these native habitats." *Ibid.*

The EA also noted that the Burrowing Owls, a California Species of Special Concern, could lose habitat and might lose potential foraging habitat from the loss of upland habitat. 8 AR 3751. The EA concluded that "[l]oss of burrowing owl habitat could be a significant cumulative impact." *Ibid.* The Belding's Savannah Sparrow, a State of California endangered species and a Federal Candidate 2 species, would also "lose winter foraging habitat and potential nesting habitat from the fill of pickleweed wetlands in Area A." *Ibid.* The EA stated that "there could be significant negative impacts" for the Salt Marsh Skipper (Federal Candidate 2 butterfly species) and the Southern California Salt Marsh Shrew (a State of California Species of Special Concern and a Federal Candidate species) if habitat for these species were flooded or destroyed during the restoration process of the salt marsh in Phase II. *Ibid.* Finally, the EA noted that the California Least Tern, which is listed as

an endangered species by both California and the federal government, "could be significantly impacted in the short-term if turbidity and disturbance during construction prevented foraging in the area during the breeding season." 8 AR 3752.

The EA also contained a summary of the comments the Corps had received after it had released the public notice that MTP-PV's permit application was complete. 8 AR 3753. The United States Environmental Protection Agency (EPA), United States Fish and Wildlife Service (USFWS) and National Marine Fisheries Service (NMFS) expressed serious concerns with the project. 8 AR 3754. EPA recommended that the NEPA document to be prepared by the Corps "should include a comprehensive cumulative analysis of impacts attributable to reasonably foreseeable future actions proposed at the same locale," including "potential non-federal actions proposed for the same geographic area." 4 AR 1815. After the Corps sent EPA a Notice of Intent (NOI) that it was going to issue the permit, EPA stated that it believed that "the three phases are clearly linked" and "the cumulative impacts of the entire project must be considered" before it could agree to permitting the initial phase. 8 AR 3469. USFWS similarly stated that an EIS appeared warranted and recommended that, at that time, the "no project alternative [should] be adopted due to the significant impacts to public fish and wildlife resources, including Federal listed endangered species." 2 AR 723. NMFS noted that "the applicant has consistently stressed the interconnection of the various parts of its overall project" and that given this approach, it was inappropriate for MTP-PV to piecemeal the permitting process by submitting three separate permit applications. 4 AR 1776. Furthermore, it recommended that given the magnitude of the project, the Corps should "reassess the determination [in the public notice] that an Environmental Impact Statement is not required." *Ibid.*

Even though the EA analyzed the harm from the entire project, the Corps gave no consideration to the environmental impact from any portion of the project, except for the filling of the wetlands, in determining whether to issue an environmental impact statement. The Corps said that the decision on whether or not to prepare an EIS "in this case need not include substantial consideration of the development in the uplands because development could occur in those areas regardless of whether this permit application is granted." 8 AR 3369. The Corps based its issuance of a Finding of No Significant Impact "on information provided by the applicant, all interested parties, and [its] assessment of environmental impacts contained in part II B of this document." 8 AR 3789. Part II B is a 5-page section that primarily contained an analysis of the alternatives to the filling of the wetlands in Phase I (8 AR 3731-3735), and not any of the impacts analyzed in the other 55 pages of the EA. The Corps concluded that "the fill proposed for 16 acres of degraded wetlands and U.S. waters for this immediate permit, and the nature of the proposed 51 acre freshwater wetland mitigation does not have sufficient impacts to warrant the preparation of an EIS." 8 AR 3769. The impacts from the other portions of the project were therefore not considered. In other words, the Corps discussed the impacts from the entire project in the EA but then ignored all of these impacts except those from filling the wetlands in concluding not to prepare an EIS.

The Corps admitted in the EA that "even though the parts [of the project] are distinct, they are not totally independent." 8 AR 3768. Based on this determination, the Corps found that mitigation in Phase I could be credited to future phases "up front and in advance o[f] their authorization, provided the success criteria are met for the proposed freshwater wetland complex." *Ibid.* The U.S. Fish and Wildlife Service questioned the appropriateness and legality of allowing this

mitigation for future phases. 8 AR 3780. Nonetheless, the Corps found that it would grant mitigation credit, even though it did not find a "strong enough link through NEPA to require that these projects be combined." 8 AR 3869. Thus, the Corps considered the entire project when it decided whether to certify the "wetlands system" (the pollution run-off and detention system) as mitigation for the filling of wetlands, but considered only the filling of the wetland portions when analyzing whether the project had significant effects.

The Decisions Below. The district court held that "the Corps should have analyzed the entire project as functionally interdependent" because the "fill of the wetlands as provided for under the Permit and the overall development on the Playa Vista property are inextricably intertwined, and are 'connected actions,' under applicable regulations." App. 65a. It found that "the developer's interest in the overall development hinges on the development of the wetlands portion." App. 64a.

The district court further found that the "fill of the wetlands and the creation of the 51.1 acre system does not have 'independent utility' such that Defendants would reasonably consider constructing it in isolation." App. 65a. It concluded that "the mixed-use development project and the freshwater system are 'links in the same bit of chain' " that "should have been considered together by the Corps in determining the environmental impact." App. 64a. The district court reasoned that the "mixed-use development could not proceed in the manner it was planned without the filling of the wetlands as authorized under the permit." App. 64a. Furthermore, it stated that (App. 64a-65a):

> The EA specifically rejected the "no-action" alternative because to do so would "eliminate crucial linkages in the applicant's proposed local street grid

> system, compromising the achievement of the applicant's planning objective of a traditional town model as an alternative to suburban development and its dependence on automobile use." Further, the wetland fill would not be justified in the absence of the mixed-use development. Defendant's assertion that the subject of the permit action has independent utility and that it will proceed to construction and see a functional purpose regardless of the outcome of the remaining project phases is disingenuous. (internal citations omitted)

The district court also found that the fill of the wetlands and the overall development should have been considered as "cumulative actions," which it defined as "actions which when viewed with other proposed actions have cumulatively significant impacts." App. 66a.

Based on these findings, the district court concluded that the Corps was required to consider the environmental harm for the entire project in determining whether to prepare an EIS and that because the harm from the entire project "significantly affect[ed] the quality of the human environment" (2 U.S.C. 4332 (2)(C)), an EIS had to be prepared. App. 92a. The district court's decision cited the abundant law in the Ninth Circuit that, in determining whether to prepare an EIS, a federal agency should consider all parts of a project that are interconnected and do not have independent utility. App. 64a. *See, e.g., Save The Yaak Comm. v. Block*, 840 F.2d 714 (9th Cir. 1988); *Thomas v. Peterson*, 753 F.2d 754 (9th Cir. 1985).

In reversing the decision of the district court, the court of appeals stated (App. 21a):

The district court's determination that the project

> would not be able to proceed as planned without the permit and that the filling of the wetlands would not occur without the project is correct.

However, despite this explicit agreement with the central factual findings of the district court, the court of appeals then immediately stated that this type of interdependence is not important since "[i]f this type of connection alone were sufficient to require a finding that an entire project falls within the purview of the Corps' jurisdiction, the Corps would have jurisdiction over all such projects * * *." App. 21a-22a. The court of appeals then stated that "the Corps does not have independent jurisdiction over the parts of the Phase I development that do not require the filling of wetlands." App. 22a. Thus, the court of appeals concluded that, despite the interconnection of the filling of wetlands and the rest of the project, the harm from the entire project could not be considered together in determining whether an EIS had to be prepared because of the Corps' lack of jurisdiction over the rest of the project. In other words, the court of appeals determined that the Corps could not consider impacts -- whether they were direct, indirect or cumulative -- unless they were within the regulatory jurisdiction of the Corps.

Subsequently, the court of appeals suggested that it did not accept the district court's findings as to the interconnection of the filling of wetlands and the remainder of the project. However, in doing so, the court of appeals repeatedly indicated that its position was based on the Corps' lack of regulatory jurisdiction except over the wetlands permit. The court of appeals found (App. 22a):

> The Corps determination that it did not have jurisdiction over the upland development is supported by the record. Phase I encompasses development of

> approximately 600 acres, only 16 of which are subject to direct control by the Corps through the permitting process. It appears that the project certainly could proceed without the permit.

The court of appeals then noted that the project was not financed by federal money and that state and local, not federal, regulations controlled the project design. App. 22-23a.

Next, the court of appeals stated that (App. 23a):

> The fill of the eight acres of wetlands for the purpose of creating the freshwater marsh could well be undertaken without the overall project, as well. The freshwater marsh sub-project has value in and of itself. Moreover, although there may be no reason to fill the remaining eight acres of wetlands if the rest of Phase I is not to be built, the regulations make clear that federal jurisdiction over this small segment of the development is not "control and responsibility" over the rest of the project sufficient to federalize the entire project.

Thus, the court of appeals admitted that at least 8 of the 16 acres subject to the wetlands permit were interconnected with the rest of Phase I because there would be no reason to fill them if the rest of Phase I did not proceed. App. 23a. However, the court of appeals concluded that even though these parts were interconnected, the environmental impact from all of Phase I could not be considered together with the environmental impact to the wetlands because of the Corps' lack of regulatory jurisdiction over the remainder of Phase I. *Ibid.*

The court of appeals' opinion is not a model of consistency or clarity. Nonetheless, the heart of the decision is that because

the Corps does not have regulatory jurisdiction over anything but the filling of wetlands, the district court's erred in determining that the environmental impacts: (a) from either the filling of the wetlands and the rest of Phase I; or (b) from the filling of the wetlands and the entire project, must be considered together. Thus, the court of appeals determined that in deciding whether to proceed with an EIS, the Corps properly limited its focus to the environmental impacts created solely by the activity over which it has regulatory jurisdiction.

1. The determination of the court of appeals that the Corps need not consider the environmental impacts caused outside its regulatory jurisdiction conflicts with the decision of this Court in *Robertson v. Methow Valley Citizens Council*, *supra*, 490 U.S. 332. That case arose out of the Forest Service's decision to issue a special use permit authorizing the development of an Alpine ski resort. *Id.* at 337. The private developer had applied for a special use permit to develop and operate the "Early Winters Ski Resort" both inside the North Cascades National Park and on a 1,165 acre parcel of land that it had acquired adjacent to the National Forest. *Id.* at 338. The Forest Service prepared an EIS ("Study") on the entire project, including the portion on the developer's land, which was not within the jurisdiction of the Forest Service. This Court noted that (*id.* at 339):

> The Study considered the effect of each level of development on water resources, soil, wildlife, air quality, vegetation, and visual quality, as well as land use and transportation in the Methow Valley, probable demographic shifts, the economic market for skiing and other summer and winter recreational activities in the Valley, and the energy requirements for the ski area and related developments. The Study's discussion of possible impacts was not limited to on-

> site effects, but also, as required by Council on Environmental Quality (CEQ) regulations, *see* 40 C.F.R. 1502.16.(b) (1987), addressed off-site impacts that each alternative might have on community facilities, socio-economic and other environmental conditions in the Upper Methow Valley. (internal quotations omitted)

Even though the EIS found that "due to uncertainty of where other public and private lands may become developed, it is difficult to evaluate the off-site impacts" (internal quotations omitted) (*ibid.*), the EIS offered suggestions on ways to mitigate significant impacts through use of conservation easements on private lands and through acquisitions and management options by local and state governments *(id.* at 343-344).

This Court specifically concluded that the Forest Service had to look outside its jurisdiction in preparing the EIS. This Court found that because (490 U.S. at 350):

> "with respect to a development such as Sandy Butte, where the adverse effects on air quality and the mule deer herd are primarily attributable to predicted off-site development that will be subject to regulation by other governmental bodies, the EIS serves the function of offering those bodies adequate notice of the expected consequences and the opportunity to plan and implement corrective measure in a timely manner."

In finding that the discussion of mitigation measures in the EIS was sufficiently detailed, the Court placed great weight on the fact that "the off-site effects on air quality and on the mule deer herd cannot be mitigated unless nonfederal government

agencies take appropriate action" and "it is those state and local governmental bodies that have jurisdiction over the area in which the adverse effects need be addressed and [] they have the authority to mitigate them." *Id.* at 352.

This Court therefore recognized in *Robertson* that, even though the private lands were outside the jurisdiction of the Forest Service, it still needed to consider how future development of those private lands would affect the environment. If an agency is required to look at impacts outside its regulatory jurisdiction when preparing an EIS, then certainly it must look outside this jurisdiction when determining whether to prepare an EIS at all. Therefore, the court of appeals' decision to allow the Corps to ignore the upland development and its impacts when deciding whether to prepare an EIS, based on the limit of the Corps' regulatory jurisdiction, is in clear conflict with *Robertson*.

2. The decision of the court of appeals is also in conflict with the decisions of other circuits. In *Sierra Club v. Marsh*, 769 F.2d 868, 872 (1st Cir. 1985), the Corps of Engineers and Federal Highway Administration decided not to prepare an EIS on a causeway, marine terminal and industrial park. The court of appeals, in an opinion by then Judge Breyer, stated that "one challenging a decision *not* to prepare an EIS must show a substantial possibility that agency action could significantly affect the quality of the human environment." (internal quotations omitted). *Id.* at 870. The court found that the agencies' EA's had analyzed the environmental effects of the causeway and terminal (*id.* at 876) and that the court could not find that the decision based on these effects alone was "'arbitrary, capricious, or an abuse of discretion' " (*id.* at 877). However, the court of appeals held that the federal agencies were also required to consider, in determining whether to prepare an EIS, the environmental effects from the industrial

park. *Ibid.* The court held that the federal agencies had to consider this development even though the industrial park involved private land, would be used by private industries, and would be subject to zoning by local governments. *Id.* at 872, 878, 880.

The court of appeals found that the effects of the industrial park were not speculative. 769 F.2d at 878. It emphasized that the port, causeway, and industrial park were part of an "integrated plan" (*ibid.*) and that both the landowner and town had prepared documents analyzing the likely development (*id.* at 879). The court then noted that the EA's had analyzed "to some extent" the likely effects of the industrial park, but that the federal agencies had concluded that there would be an insignificant impact on the environment. *Id.* at 880. The court of appeals found that "the relevant federal agencies' conclusions that the project would have no significant impact rest not so much on their belief that the industrial park would not affect the environment, as upon their belief that they need not take account of the industrial park's effects." *Id.* at 881. The court held that these effects had to be considered and, based on this consideration, preparation of an EIS was required.

Sierra Club v. Marsh is virtually identical to the present case. In both cases, there was a plan which included activities not within the jurisdiction of the federal agencies. In both cases, the EA's discussed the environmental impact of the activities not within the jurisdiction of the federal agencies. In both cases, the federal agencies did not consider significantly (*Sierra Club v. Marsh*) or at all (this case) the impacts of the activities outside federal agency jurisdiction in determining whether to prepare an EIS. Thus, *Sierra Club v. Marsh* is in direct conflict with the decision of the court of appeals here.

In *Sierra Club v. U.S. Forest Service*, 46 F.3d 835, 837

(8th Cir. 1995), the Sierra Club challenged the Forest Service's EA, which had been prepared "to determine whether timber sales in Victoria would significantly affect the environment," because the EA had failed to consider the cumulative impacts from private acts on private lands. The project involved an area of 16,883 acres in the Black Hills National Forest, including 1,511 acres of private land. *Ibid.* The Court of Appeals for the Eighth Circuit recognized that "40 C.F.R. § 1508.7 requires an EA to consider impacts resulting from the activities of Federal or non-Federal agencies or persons" and stated that this provision required "analysis of the impacts [that] activities on private land have on the Forest." *Id.* at 839. The court of appeals held that the "district court erred in concluding otherwise." *Ibid.* While the court of appeals held that an EIS was not required for other reasons (*id.* at 840), it clearly held that analysis of activities outside the jurisdiction of the federal agency must be considered in determining whether to prepare an EIS. Thus, the decision as to the scope of consideration in determining whether to prepare an EIS in *Sierra Club v. U.S. Forest Service* is in conflict with the decision of the court of appeals here.

In *Society Hill Towers Owners' Assn. v. Rendell, supra*, 210 F.3d at 172, the plaintiff claimed that the City of Philadelphia had not properly performed the required environmental review under NEPA prior to the Department of Housing and Urban Development's ("HUD") approval of an Urban Development Action Grant. In determining that HUD had properly decided that an environmental impact statement was not required, the Court of Appeals for the Third Circuit considered "the impact of future development that has been identified in several planning documents including a proposed 'mega' entertainment complex." *Id.* at 182. Although the court of appeals held that the other development, which was not

subject to HUD's jurisdiction,[9] need not be considered in determining whether to issue an EIS in this case, it did so only because "[i]t is not at all certain that the proposed 'mega' entertainment complex or any of the projects included in the planning document will ever be completed." *Ibid.* Thus, the court recognized that impacts outside HUD's control must be considered under NEPA, even if they are not within HUD's jurisdiction, if they are virtually certain to be completed as in the present case.

The Court of Appeals for the Fifth Circuit has similarly recognized that NEPA review requires analysis of connected activities even though they are outside the jurisdiction of the federal agency involved. In *Vieux Carre Prop. Owners, Res. v. Pierce*, 719 F.2d 1272, 1278 (5th Cir. 1983), the court considered the adequacy of an EA, which was the basis for the decision that an EIS did not need to be prepared. The court noted that HUD's NEPA regulations require that "[r]egardless of funding sources, integrally related activities designed to accomplish, in whole or in part, a specific goal are to be grouped together for consideration as a single project." *Id.* at 1277. It recognized that the impacts from a hotel and shopping mall that were being privately funded and were separate from the specific project at issue must be included in the environmental assessment since they were "integrally related and part of the developer's strategy for the treatment of the project area" (internal quotations omitted). *Ibid.* This is equally true in the present case.

3. The court of appeal's decision also conflicts with the regulations of the Council on Environmental Quality implementing NEPA. By allowing the Corps to limit its

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[9]The entertainment complex had been part of the original proposed project, but the application to HUD was amended to exclude it. 210 F.3d at 172.

consideration to only impacts within its regulatory jurisdiction when deciding whether to prepare an EIS, the Ninth Circuit has eliminated CEQ's requirement for an agency to consider the full range of impacts that a proposed action will have on the environment at the very outset. The CEQ regulations provide that "[e]ffects and impacts as used in these regulations are synonymous" and "[e]ffects includes ecological (such as the effects on natural resources and on the components, structures, and functioning of affected ecosystems), aesthetic, historic, cultural, economic, social or health, whether direct, indirect, or cumulative." 40 C.F.R. 1508.8. The CEQ regulations define cumulative impacts broadly as (40 C.F.R. 1508.7):

> "the impact on the environment which results from the incremental impact of the action when added to other past, present, and reasonably foreseeable future actions *regardless of what agency (Federal or non-Federal) or person undertakes such other actions.*" (emphasis added)

Thus, the impacts that an agency is required to consider are explicitly not confined to the agency's regulatory jurisdiction.

Furthermore, the CEQ regulations require agencies to consider "connected actions" and "cumulative actions" within a single EA or EIS to determine whether there is a significant impact. 40 C.F.R. 1508.25. In order to determine whether a cumulative or connected action has a significant impact, the CEQ regulations require an agency to ascertain (40 C.F.R. 1508.27(b)(7)):

> Whether the action is related to other actions with individually insignificant but cumulatively significant impacts. Significance exists if it is reasonable to anticipate a cumulatively significant impact on the

> environment. Significance cannot be avoided by terming an action temporary or by breaking it down into smaller parts.

Thus, the CEQ regulations clearly provide for the consideration of actions outside of the jurisdiction of the agency. This Court has held that the CEQ regulations are entitled to "substantial deference." *Andrus v. Sierra Club*, 442 U.S. 347, 358 (1979); *Robertson v. Methow Valley Citizens Council*, *supra*, 490 U.S. at 355.

4. The importance of this issue cannot be underestimated. "An EA aims to simply identify (and assess the 'significance' of) potential impacts on the environment." *Sierra Club v. Marsh*, *supra*, 769 F.2d at 875. In determining whether an action could have a significant impact, it is essential that an agency be required to look outside its regulatory jurisdiction to make this threshold determination. Confining an agency's review to its regulatory jurisdiction would thwart NEPA's basic requirement that an agency adequately assess whether an action, including its direct, indirect, and cumulative impacts, poses a threat to the environment. This preliminary determination in an EA of whether there are significant impacts is especially important when the action being reviewed is one part of a larger planned project.

Environmental impact statements frequently analyze other portions of projects over which the federal agency has no regulatory jurisdiction but are part of the same project. For example, EIS's on federally funded highways customarily consider the environmental impacts of the development that are expected to be induced by construction of the highway. Those developments are normally constructed by private developers and permits are usually given by local governments. If the environmental impact of most of the project were not to be

considered, as in this case, the protection afforded by NEPA to the environment by requiring analysis and consideration of the full environmental effects of a project would be seriously undermined.

Moreover, the issue of the scope of environmental review and segmentation under NEPA is dealt with in the regulations of numerous government agencies and in dozens of judicial decisions. We have seen above that the regulations of the Council on Environmental Quality deal with these issues. So do the regulations of the Corps and other agencies. *See, e.g.*, 33 C.F.R. 325, Appendix B, Sec. 7(b), 23 C.F.R. 771.111(f); 24 C.F.R. 50.32; 36 C.F.R. 219.4. Segmentation of NEPA review has been litigated in dozens of cases.[7] These regulations and decisions reflect the fact that this issue is crucial to whether NEPA will continue to force agencies to consider fully the environmental impacts resulting from their actions.

CONCLUSION

For the foregoing reasons, petitioners respectfully submit that the petition for a writ of certiorari should be granted.

Respectfully submitted,

Bruce J. Terris*
Kevin O. Leske

(**Counsel of Record*)
May 10, 2001

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[7] *E.g., Conservation Law Found. v. Federal Hwy. Admin.*, 24 F.3d 1465 (1st Cir. 1994); *Sierra Club v. Froehlke*, 534 F.2d 1289 (8th Cir. 1976); *Sierra Club v. Lujan*, 949 F.2d 362 (10th Cir. 1991); *Park County Resource Council, Inc. v. United States Dep't of Agric.*, 817 F.2d 609 (10th Cir. 1987).

APPENDIX

FOR PUBLICATION
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

WETLANDS ACTION NETWORK, a California non-profit organization; BALLONA WETLANDS LAND TRUST, a California non-profit organization, *Plaintiffs-Appellees,*	)	No. 98-56242 D.C. No. CV-96-08407-RSWL
v.	)	
UNITED STATES ARMY CORPS OF ENGINEERS, an agency of the United States; MICHAL R. ROBINSON, in his capacity as District Engineer of the United States Army Corps of Engineers; JOE N. BALLARD, in his capacity as Chief Engineer of the United States Army Corps of Engineers, *Defendants,*	)	
and	)	
PLAYA CAPITAL COMPANY, L.L.C., as successor-in-interest to Maguire Thomas Partners-Playa Vista, *Defendant-Intervenor-Appellant.*	)	
WETLANDS ACTION NETWORK, a California non-profit organization; CALIFORNIA PUBLIC INTEREST RESEARCH GROUP, *Plaintiffs-Appellants,*	)	No. 98-56474 CV D.C. No. 96-08407-RSWL

and

BALLONA WETLANDS LAND TRUST, a California non-profit organization,
Plaintiff,

v.

UNITED STATES ARMY CORPS OF ENGINEERS, an agency of the United States; MICHAL R. ROBINSON, in his capacity as District Engineer of the United States Army Corps of Engineers; JOE N. BALLARD, in his capacity as Chief Engineer of the United States Army Corps of Engineers,
Defendants,

and

PLAYA CAPITAL COMPANY, L.L.C., as successor-in-interest to Maguire Thomas Partners-PlayaVista,
Defendant-Intervenor Appellee.

WETLANDS ACTION NETWORK, a California non-profit organization BALLONA WETLANDS LAND TRUST, CALIFORNIA PUBLIC INTEREST RESEARCH GROUP,
Plaintiffs-Appellants,

vs.

UNITED STATES ARMY CORPS OF ENGINEERS, an agency of the United

No. 98-56672
D.C. No. CV-96-08407-RSWL

OPINION

States; JOE N. BALLARD, in his capacity as Chief Engineer of the United States Army Corps of Engineers; ROBERT L. DAVIS, Col.,

Defendants-Appellants,

Appeals from the United States District Court for the Central District of California

Ronald S. W. Lew, District Judge, Presiding
Argued and Submitted
May 4, 1999--Pasadena, California
Filed August 21, 2000

Before: Melvin Brunetti, Kim McLane Wardlaw, Circuit Judges, and John W. Sedwick,[1] District Judge.

Opinion by Judge Brunetti

COUNSEL

Charles S. Treat, Leslie A. Pereira, Robert D. Crockett, Adam H. Braun, Latham & Watkins, Los Angeles, California, for appellant Playa Capital Company, L.L.C., successor-in-interest to Maguire Thomas Partners-Playa Vista.

Charles S. Crandall, San Diego, California, and David H. Williams, Public Interest Lawyers Group, San Francisco, California, for appellees, Wetlands Action Network and California Public Interest Research Group.

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[1]The Honorable John W. Sedwick, United States District Judge for the District of Alaska, sitting by designation.

Anthony P. Hoang, Robert L. Klarquist, Mark R. Haag, DAG, Washington, D.C., John Gleason, U.S. Army Corps of Engineers, Ventura, California, and Lyn Cox, Office of Regional Solicitor, Department of Interior, Sacramento, California, for appellants-cross-appellees, United States Corps of Engineers.

Carlyle W. Hall, Jr., Hall & Associates, Los Angeles, California, for amicus Friends of Ballona Wetlands.

OPINION

BRUNETTI, Circuit Judge:

This case involves a challenge by environmental groups to the United States Army Corps of Engineers ("Corps") decision to grant Maguire Thomas Partners-Playa Vista ("MTP-PV")[2/] a permit to fill 16.1 acres of federally delineated wetlands and to mitigate the fill by creating a 51-acre freshwater wetland system. Wetlands Action Network and California Public Interest Research Group (collectively "WAN") brought suit in the district court alleging that the Corps had failed to fulfill their legal obligations under the Clean Water Act ("CWA"), 33 U.S.C. § 1251 *et seq.*, and the National Envi ronmental Policy Act ("NEPA"), 42 U.S.C. § 4321 *et seq.*, in granting MTP-PV a fill permit pursuant to section 404 of the CWA. The district court denied MTP-PV's motion to intervene as a right in the NEPA claims but granted

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[2/]The Defendant-Intervenor-Appellant Playa Capital Company is the successor-in-interest to Maguire Thomas Partners-Playa Vista. For clarity and consistency, we refer to the developer as MTP-PV as did the district court.

MTP-PV's motion in the alternative for permissive intervention. The district court, however, limited MTP-PV's participation in the NEPA claims to the relief phase. MTP-PV appeals this decision.

The district court granted summary judgment to WAN on its NEPA claims, invalidated the permit, and enjoined MTP-PV from any further construction activities in the area covered by the permit.[3/] The Corps appeals the district court's determination that it violated NEPA. MTP-PV appeals the district court decision to issue the injunction claiming that (1) the district court committed error by denying MTP-PV a hearing on the remedial phase of the proceedings, (2) the injunction is moot, (3) the district court erred in failing to balance the equities of a permanent injunction, and (4) the district court should not have issued the injunction as WAN is guilty of laches. WAN filed a cross-appeal claiming that the district court abused its discretion in failing to broaden the injunction in order to protect the integrity of the environment and the NEPA process during the preparation of the Environmental Impact Statement ("EIS"). We consolidated the appeals and we affirm in part and reverse in part.

I.

Since 1979, MTP-PV and its predecessor-in-interest have been planning to build a large scale mixed use development on the Playa Vista property. The proposed development is expected to cover over 1,000 acres and include residential areas, a marina, and numerous commercial

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[3/]In a separate order, the district court granted the Corps' motion for summary judgment on WAN's CWA claim. WAN did not appeal that decision.

developments including hotels, retail establishments, and an entertainment media and technology district. The project has been the subject of much dispute as the Playa Vista property is the largest remnant parcel of undeveloped land in a heavily urbanized western portion of Los Angeles County.[4/]

The Playa Vista property contains approximately 186 acres of federally delineated wetlands. As part of its project, MTP-PV plans to eventually dredge and fill 21.4 acres of wetlands. Before preparing an application for a dredge and fill permit for any of the project activities, MTP-PV met with the Corps to determine the proper division of the project for permitting purposes. MTP-PV proposed to divide the overall project into the following three separate permit applications to correspond to the three separate phases of the project:

> The first phase is for authorization to fill 7.8 acres of scattered wetland patches in Areas B,

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[4/]Amicus Curiae Friends of Ballona Wetlands challenged the California Coastal Commission's decision to certify the County's land use plan allowing for the development of Playa Vista. This litigation was settled in 1990. In 1993, an environmental group challenged the legality of the City of Los Angeles' Final Environmental Impact Report ("EIR") for the first phase of this project. The superior court found that the EIR was sufficient as an information document in that it disclosed the significant environmental effects and contained adequate alternative site, mitigation and cumulative impacts analysis. The court also rejected the plaintiffs claim that the City had impermissibly "piecemealed" the environmental review process by limiting its review to the first phase of the project. In 1996, one of the plaintiffs here challenged the City's environmental review of project modifications to accommodate development of the entertainment and media district and the wetlands design. The state court of appeals affirmed the state trial court's approval of the City's review process.

> C, and D[5/] for mixed-use development. It also includes the creation of a 52-acre fresh water wetland complex which [MTP-PV] proposes as mitigation for a total of 21.4 acres of wetlands that would be dredged and filled for all phases of the Playa Vista project. The creation of the freshwater wetland system would require filling 7.7 acres of wetlands in Area B for the berm (4.0 acres of which would be restored to wetlands leaving 3.7 acres as permanently filled).
>
> The second phase is for the restoration and creation of a salt marsh which would occur in 160 acres of delineated degraded wetlands in Area B. By restoring those wetlands and converting uplands to wetlands, an approximately 230-acre salt marsh system would be created.
>
> The third is for the development of a marina and ecological enhancement of the Ballona flood control channel which will dredge and fill 9.8 acres of wet lands in Area A. Of that, 3.7 acres are a man-made drainage ditch and 8.1 acres are scattered, degraded wetlands.

U.S. Army Corps of Engineers, Public Notice of Permit Application at 4-5 (January 2, 1991). The Corps agreed that it was appropriate to divide the overall project into three phases for permitting purposes as each of the proposed phases had

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[5/]For planning purposes, MTP-PV divided the Playa Vista project site into four parcels designated Areas A, B, C, and D.

independent viability.

In August 1990, MTP-PV applied to the Corps for a permit to fill 16.1 acres of federally delineated wetlands as part of Phase I of the project.[6/] The eight acres proposed to be filled for multi-use development are man-made flood control ditches and degraded wetlands located in seventeen isolated patches across the Playa Vista property. The remaining eight acres, located in Area B, MTP-PV proposed to fill in order to create a 51.1 acre freshwater wetland system consisting of 26 acres of freshwater marsh and 25 acres of freshwater riparian corridor. Of the latter eight acres, four of the acres are to be restored to wetlands and the remaining four are to be permanently filled to create a berm between the freshwater wetland system and a saltwater marsh which MTP-PV plans to restore as part of Phase II of the project.

In October 1990, MTP-PV submitted an analysis of alternatives to the proposed filling of wetlands. The analysis describes six alternatives including four different configurations of the mixed-use development which avoid all or part of the wetlands as well as the possibility of using an offsite location for the development. Based on its analysis, MTP-PV concluded that there was no practical alternative way to accomplish its purpose of building an environmentally sensitive development that would not result in other significant environmental impacts.

On January 2, 1991, the Corps issued a public notice of the permit application. The notice described the activity for

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[6/] Phase I of the project involves the development of approximately 5 million square feet of office space, 13,000 residential units, and hotel and retail space.

which the permit was requested as well as the entire Playa Vista development. The notice also included the Corps' preliminary determination that an EIS would not be required for the work proposed in Phase I of the project. The Corps solicited comments from the interested public and relevant state and federal resource agencies. The period of public review of the permit application originally was set for January 1, 1991 to February 2, 1991. The Corps extended the review period to February 15, 1991 at the request of the EPA.

The Corps received numerous comments from the general public, environmental groups, and state and federal resource agencies. In particular, the United States Fish and Wildlife Service ("FWS"), the National Marine Fisheries Service ("NMFS") and the Environmental Protection Agency ("EPA") expressed concern that, *inter alia*, the notice of intent and the permit application did not contain a sufficiently detailed analysis of project alternatives and did not provide a comprehensive evaluation of the cumulative impacts attributable to the entire development project.

In response to the comments received, MTP-PV submitted to the Corps comments addressing the concerns raised by FWS and NMFS. MTP-PV also submitted a revised "Practical Alternative Analysis" which contained an analysis of five alternatives to the mixed-use development portion of the project and six alternatives to the freshwater wetland system portion. To further supplement its analysis, MTP-PV also submitted three scientific studies: "Biological Value of the Ballona Wetlands System," "Water Balance for the Proposed Freshwater Wetland System," and "Water Demand of the Proposed Ballona Freshwater Wetland System."

In order to resolve the resource agencies' remaining

concerns about the project, the Corps met with representatives of the FWS, NMFS, EPA, and the California Department of Fish and Game on November 7, 1991. At this meeting the agencies expressed concern regarding the three-permit approach to the project and requested that the Corps delay review and approval of any component of the project until MTP-PV had submitted an application for Phase II of the project.

After reviewing documentation submitted by MTP-PV addressing the agencies' concerns, the Corps found that MTP-PV's responses to the comments were acceptable. The Corps determined, however, that MTP-PV would be required to provide in-kind mitigation for any salt marsh habitat lost as a result of the project.

On February 25, 1992, pursuant to CWA § 404(q), the Corps sent a first informal notice of intent to issue MTP-PV's permit to NMFS, EPA, and FWS. On April 8, 1992, the Corps met with the agencies to discuss their concerns. The agencies requested additional documentation regarding the freshwater wetlands system which MTP-PV supplied on April 17, 1992. After meeting with the Corps again on May 5, 1992, and MTP-PV on May 6, 1992, NMFS reached an agreement with MTP-PV which resolved its concerns. MTP-PV agreed to inclusion in the permit of various special permit conditions proposed by NMFS and the EPA.

On May 22, 1992, the Corps issued a second notice of intent to issue the permit which included a revised Environmental Assessment ("EA") and the modified special conditions suggested by the agencies. After receiving the requested technical information, EPA, NMFS, and FWS decided not to object further to the issuance of the permit for Phase I of the Playa Vista project.

The Corps issued the permit and special conditions along with the associated EA and Finding of No Significant Impact ("FONSI") on July 1, 1992. In the EA, the Corps found that the division of the project into three applications was a logical division and did not constitute inappropriate piecemealing of the overall project. Due to the relatedness of the three phases, however, the Corps found that it would accept mitigation credit for the future projects as part of Phase I, provided that the later phases eventually receive authorization and that the "success criteria" for the freshwater wetland system are met.

The EA also contained a discussion of alternatives to the project including: (1) no action alternative; (2) alternative project designs; (3) the creation of a salt marsh in lieu of the freshwater wetland system; and (4) possible off-site locations. The Corps ultimately determined that there were no practical alternatives to the proposed project that would result in less adverse impacts on the environment.

In the EA, the Corps evaluated the cumulative impact that the project would have on the surrounding areas. The Corps found, however, that it did not need to include substantial consideration of the development in the uplands area as part of the NEPA review of permit application because it found that such development was outside its jurisdiction. A discussion of the comments received during the public notice period was also included in the EA as well as the Corps' responses to the concerns raised.

The Corps ultimately determined that the project would result in a net increase in wetland values. After reviewing the information provided by MTP-PV and all interested parties, the Corps found that the permit action at issue would not have a

significant impact on the quality of the human environment and that an EIS would therefore not be required. The Corps issued the permit. On April 20, 1993, MTP-PV executed and transmitted the permit to the Corps. Following the issuance of the permit, MTP-PV performed extensive filling, clearing, and grading in the wetlands in the permit area.

On December 3, 1996, WAN brought five claims against the Corps, four alleging violations of NEPA and the fifth alleging a violation of the CWA. WAN sought to have all construction at the site enjoined until the Corps issued an EIS as well as a preliminary injunction.

On August 22, 1997, the district court granted MTP-PV's motion to intervene as to the CWA claim. The district court denied MTP-PV's motion to intervene as of right with regard to the NEPA claims, but granted it permissive right to intervene in the remedial phase of such claims.

On November 6, 1997, the district court denied WAN's motion for a preliminary injunction finding that WAN was unlikely to succeed on the merits of its CWA and NEPA claims. We dismissed WAN's interlocutory appeal of that order on May 18, 1997. We found that because WAN had not shown a continuing cognizable injury for which the requested preliminary injunction would provide relief, the appeal of the NEPA claims was moot. On November 14, 1997, the district court granted MTP-PV's and the Corps' motion for partial summary judgment as to the CWA claim.

On June 26, 1998, the district court granted WAN's motion for summary judgment on its NEPA claims. The district court found that the Corps had violated NEPA by improperly limiting the scope of its analysis to the impacts of activities

covered by the permit, rather than considering impacts associated with the whole development project. The district court further found that even if the scope of the analysis were proper, the Corps decision to issue a EA rather than an EIS was arbitrary and capricious because of the untested nature of the freshwater wetlands system, the lack of a fully developed mitigation plan, and the controversy that surrounded the Corps' determination of the permitted activities' nature and effect. The district court rescinded the permit and enjoined MTP-PV from any further construction activities in the area covered by the permit. The district court did not hold a hearing regarding the propriety of issuing an injunction in this case, and MTP-PV was therefore not allowed to enter evidence on this issue. The district court denied WAN's motion to enjoin MTP-PV from continuing work on the upland portion of its property on July 13, 1998. The final judgment issued on August 10, 1998, and the district court denied reconsideration on August 21, 1998.

II.

A. Intervention as of Right Under NEPA

MTP-PV appeals the district court's decision to deny its motion to intervene as of right on the merits of the NEPA claims. We review a district court's ruling on a motion to intervene as a matter of right de novo. *Forest Conservation Council v. United States Forest Service*, 66 F.3d 1489, 1493 (9th Cir.1995).

To intervene as of right under Federal Rule of Civil Procedure 24(a) an applicant must claim "an interest relating to the property or transaction which is the subject of the action," the protection of which may, as a practical matter, be impaired or impeded by the action if the applicant is not allowed to

participate in the litigation. *See* Fed. R. Civ. P. 24(a).[7/] We apply the following four-part test to determine if an applicant has a right to intervene:

> (1) the motion must be timely; (2) the applicant must claim a "significantly protectable" interest relating to the property or transaction which is the subject of the action; (3) the applicant must be so situated that the disposition of the action may as a practical matter impair or impede its ability to protect that interest; and (4) the applicant's interest must be inadequately represented by the parties to the action.

Sierra Club v. EPA, 995 F.2d 1478, 1481 (9th Cir.1993).

As a general rule, "the federal government is the only proper defendant in an action to compel compliance with NEPA." *Churchill County v. Babbitt*, 150 F.3d 1072, 1082, as amended by 158 F.3d 491 (9th Cir.1998); *see also Forest Conservation Council*, 66 F.3d at 1499; *Sierra Club*, 995 F.2d at 1485; *Portland Audubon Society v. Hodel*, 866 F.2d 302, 309 (9th Cir.1989). "The rationale for our rule is that, because

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[7/]Rule 24(a) provides:

> Upon timely application anyone shall be permitted to intervene in an action . . . (2) when the applicant claims an interest relating to property or transaction which is the subject matter of the action and the applicant is so situated that the disposition of the action may as a practical matter impair or impede the applicant's ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.

NEPA requires action only by the government, only the government can be liable under NEPA." *Churchill County*, 150 F.3d at 1082. Because a private party can not violate NEPA, it can not be a defendant in a NEPA compliance action. *Id.* Based on this rule, the district court found that MTP-PV did not assert a legally protectable interest that relates to the NEPA claims.

MTP-PV argues that the "none but a federal defendant" rule does not apply to NEPA actions involving an attack upon a permit issued to a private party. The cases on which MTP-PV relies, however, do not support this proposition. For example, in *Foundation for Horses v. Babbitt*, 154 F.3d 1103 (9th Cir.1998), the plaintiffs alleged that the National Park Service violated NEPA when it decided to remove a herd of horses from national park land and individual defendants were joined because of their purported interest in the horses. Contrary to MTP-PV's contention that we held that such a property interest was sufficient to remove the case from the normal rule that only the federal government should be a defendant in a NEPA suit, we found that the "normal rule" did not apply to the case because NEPA did not apply to the agency's decision to remove privately owned horses. *Id.* at 1106.

MTP-PV's assertion that Ninth Circuit precedent prevents us from adopting a broad interpretation of *Churchill County* is without merit. Specifically, MTP-PV avers that a broad reading of *Churchill County* would squarely conflict with *County of Fresno v. Andrus*, 622 F.2d 436 (9th Cir.1980). In *Churchill County*, however, we addressed the issue of whether *County of Fresno* represents an exception to the general rule that only the federal government can be a defendant in a NEPA compliance action. We noted that"[w]hatever exception *County of Fresno* represents, however, has been limited by later

decisions to the remedial phase of a trial." 150 F. 3d. at 1083 (citing *Forest Conservation Council*, 66 F.3d at 1499 n.11; *Sierra Club*, 995 F.2d at 1485). *Churchill County* is controlling here and we therefore affirm the district court's decision to limit MTP-PV's intervention in the NEPA action to the remedial phase.

B. NEPA Claims

1. Standard of Review

We review de novo a district court's decision to grant summary judgment. *Blue Mountains Biodiversity Project v. Blackwood*, 161 F.3d 1208, 1211 (9th Cir.1998), *cert. denied*, 527 U.S. 1003, 119 S. Ct. 2337, 144 L.Ed. 2d 235 (1999). The Corps' decision to prepare an EA rather than an EIS is reviewed under the APA's arbitrary and capricious standard. *Northwest Environmental Defense Center v. Bonneville Power Administration*, 117 F.3d 1520, 1536 (9th Cir.1997). The arbitrary and capricious standard requires a court "to ensure that an agency has taken the requisite 'hard look' at the environmental consequences of its proposed action, carefully reviewing the record to ascertain whether the agency decision is 'founded on a reasoned evaluation of the relevant factors.'" *Greenpeace Action v. Franklin*, 14 F.3d 1324, 1332 (9th Cir. 1992) (quoting *Marsh v. Oregon Natural Resources Council*, 490 U.S. 360, 373-74, 378, 109 S.Ct. 1851, 104 L. Ed. 2d 377 (1989)) (internal quotations omitted). This standard of review is deferential: we cannot substitute our judgment for that of the agency. *City of Carmel-By-The-Sea v. U.S. Dep't. of Transp.*, 123 F.3d 1142, 1150-51 (9th Cir.1997). The agency's decision will only be overturned if the agency committed a "clear error in judgment." *Northwest Environmental Defense Center*, 117 F.3d at 1536 (quoting *Marsh*, 490 U.S. at 378, 385, 109 S. Ct.

851) (internal quotation marks omitted).

2. Scope of NEPA Analysis

a. Major Federal Action

NEPA requires a federal agency to prepare an EIS for all "major Federal actions significantly affecting the quality of the human environment." 42 U.S.C. § 4332(2)(C). "The NEPA does not specify the scope of analysis that federal agencies must conduct in determining whether their actions, when combined with private actions, come within the mandate of § 4332(2)(C)." *Sylvester v. U.S. Army Corps of Engineers*, 884 F.2d 394, 398 (9th Cir.1989). The Corps' NEPA implementing regulations, which we upheld in *Sylvester*, 884 F.2d at 399, require that, where the activity requiring a DA permit is "merely one component of a larger project," the Corps "address the impacts of the specific activity requiring [a] permit and those portions of the entire project over which the district engineer has sufficient control and responsibility to warrant Federal review" in the EA or EIS. 33 C.F.R. Part 325 Appendix B § 7(b). The Corps' determination of the appropriate scope of the environmental review process is entitled to deference. *See Marsh*, 490 U.S. at 375-76; *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 359, 109 S. Ct. 1835, 104 L. Ed. 351 (1989).

The Corps' NEPA implementing regulation provides in pertinent part:

> b. Scope of analysis. (1) In some situations, a permit applicant may propose to conduct a specific activity requiring a Department of the Army (DA) permit (e.g.,

construction of a pier in a navigable water of the United States) which is merely one component of a larger project (e.g., construction of an oil refinery on an upland area). The district engineer should establish the scope of the NEPA docu ment (e.g., the EA or EIS) to address the impacts of the specific activity requiring a DA permit and those portions of the entire project over which the district engineer has sufficient control and responsibility to warrant Federal review.

(2) The district engineer is considered to have control and responsibility for portions of the project beyond the limits of the Corps jurisdiction where the Federal involvement is sufficient to turn an essentially private action into a Federal action. These are cases where the environmental consequences of the larger project are essentially products of the Corps permit action.

Typical factors to be considered in determining whether sufficient "control and responsibility" exists include:

(i) Whether or not the regulated activity comprises "merely a link" in a corridor type project (*e.g.*, a transportation or utility transmission project).

(ii) Whether there are aspects of the upland

> facility in the immediate vicinity of the regulated activity which affect the location and configuration of the regulated activity.
>
> (iii) The extent to which the entire project will be within Corps jurisdiction.
>
> (iv) The extent of cumulative Federal control and responsibility.

33 C.F.R. Part 325, Appendix B § 7(b).

The Corps here determined that the EA "need not include substantial consideration of development in the uplands because development could occur in those areas regardless of whether this permit application is granted." The Corps, therefore, only considered the environmental impacts resulting from MTP-PV's application to fill 16.1 aces of wetlands in constructing Phase I of the development.

WAN contends, and the district court found, that the Corps improperly limited the scope of its NEPA analysis and that it was required under NEPA and its own regulations to evaluate the environmental impacts attributable to the whole development of Phase I of the project. WAN's argument centers on the assertion that the upland development planned in Phase I and the permit activities, i.e. the filling of the wetlands, are functionally interdependent. Without the permit, WAN avers, the Phase I development will not proceed and without the upland development the filling activities would not be justified. Additionally, WAN posits that the record demonstrates that the location and configuration of the wetlands to be filled greatly affected the design of the mixed-use development in Phase I and that, therefore, the Corps was required to consider the

whole Phase I as a "federal action" for purposes of NEPA.

We have upheld an agency's decision to limit the scope of its NEPA review to the activities specifically authorized by the federal action where the private and federal portions of the project could exist independently of each other. In *Sylvester*, we reviewed the Corps' grant of a permit to fill eleven acres of wetlands in order to construct part of a golf course which itself was part of a larger resort complex. 884 F.2d at 396. The Corps limited its NEPA review to the impacts of the construction of the golf course, reasoning that it had no jurisdiction over the upland development. *Id.* at 396-397. We upheld the agency's decision, finding that although the golf course and the entire resort complex "would benefit from the other's presence" they were not sufficiently interrelated to constitute a single "federal action" for NEPA purposes. *Id.* at 400-01; *see also California Trout v. Schaefer*, 58 F.3d 469 (9th Cir.1995) (upholding agency's decision to limit the scope of its NEPA review to impacts associated with the fill of wetlands rather than considering the impact on downstream fisheries from an entire canal project); *Enos v. Marsh*, 769 F.2d 1363, 1371-72 (9th Cir.1985) (upholding agency's decision to exclude from its NEPA analysis the impact of non-federal shore facilities for a new deep draft harbor); *Friends of Earth, Inc. v. Coleman*, 518 F.2d 323, 328 (9th Cir.1975) (finding that an agency was not required to prepare an EIS for state funded projects in a partially federally funded airport development). We have also looked to such factors as the degree of federal funding or supervision over a project. *See Enos*, 769 F.2d at 1371-72. Deciding whether federal and non-federal activity "are sufficiently interrelated to constitute a single `federal action' for NEPA purposes will generally require a careful analysis of all facts and circumstances surrounding the relationship." *Friends of the Earth, Inc. v. Coleman*, 518 F.2d 323 (9th Cir. 1975);

accord Enos, 769 F.2d at 1371.

The district court found that the present case is distinguishable from *Sylvester* because neither the Phase I development nor the fill activities would occur independently of each other. The district court based its conclusion on evidence in the record which indicated that Phase I of the project could not proceed in the manner it was planned without the filling of the wetlands and that there were "crucial linkages" between MTP-PV's proposed local street grid system and the filling of the wetlands. The district court also found that, unlike the permitted activity in *Sylvester*, the specific activities authorized in the permit here, the filing of wetlands and the creation of the 51.1 acre freshwater wetland system, did not have independent utility.

The district court's determination that the project would not be able to proceed as planned without the permit and that the filling of the wetlands would not occur without the project is correct. The conclusion that the district court drew from these findings, however, is in error. The linkage that the district court found between the permitted activity and the specific project planned is the type of "interdependence" that is found in any situation where a developer seeks to fill a wetland as part of a large development project. If this type of connection alone were sufficient to require a finding that an entire project falls within the purview of the Corps' jurisdiction, the Corps would have jurisdiction over all such projects including those which the Corps' regulations cite as examples of situations in which the Corps would not have jurisdiction over the whole project. *See* 33 C.F.R. Part 325, Appendix B § 7(b)(3).

The district court determined that this case was controlled by *Thomas v. Peterson*, 753 F.2d 754, 758 (9th Cir.

1985), and that the Corps was required to consider the impact of both the Phase I upland development and the specific filling activity authorized by the permit in its NEPA analysis. The district court's reliance on *Thomas* to answer the question of whether the Corps has sufficient control and authority over the upland development to warrant federal review is misplaced. As is discussed below, *Thomas* involved a challenge to the Forest Service's determination that it was not required to consider the environmental impacts of two related federal actions in a single permit. In that case, the Forest Service did not dispute the fact that it would need to assess the environmental impacts of both actions at some point and that it had jurisdiction over both actions. Here, by contrast, the Corps does not have independent jurisdiction over the parts of the Phase I development that do not require the filling of wetlands. *See also, California Trout*, 58 F.3d at 474 (noting that *Thomas* is inapposite where the federal agency performing the environmental review does not have control over the whole project).

The Corps determination that it did not have jurisdiction over the upland development is supported by the record. Phase I encompasses development of approximately 600 acres, only 16 of which are subject to direct control by the corps through the permitting process. It appears that the project certainly *could* proceed without the permit and, as the Corps notes, is currently proceeding without the permit. Additionally, the project is not financed by federal money and state and local, not federal, regulations control the overall design. *See California Trout*, 58 F.3d at 473; *Enos*, 769 F.2d at 1371-72 (finding no federal action for purposes of NEPA where non-federal portion of a project received no federal funding and was not subject to federal supervision); *Alaska v. Andrus*, 591 F.2d 537, 541 (9th Cir.1979) ("[w]here federal funding is not present, [we have] generally been unwilling to impose the

NEPA requirement" of filing an EIS). The project has also been subjected to extensive state environmental review. *See Sylvester II*, 884 F.2d at 401 ("We, finally, draw comfort from the fact that ordinary notions of efficiency suggest a federal environmental review should not duplicate competently performed state environmental analyses").

The fill of the eight acres of wetlands for the purpose of creating the freshwater marsh could well be undertaken without the overall project, as well. The freshwater marsh sub-project has value in and of itself. Moreover, although there may be no reason to fill the remaining eight acres of wetlands if the rest of Phase I is not to be built, the regulations make clear that federal jurisdiction over this small segment of the development is not "control and responsibility" over the rest of the project sufficient to federalize the entire project. *See* 33 C.F.R. pt. 325 app. B § 7(b)(2) (providing that parts of a project beyond Corps jurisdiction must be considered "where the environmental consequences of the larger project are essentially products of the Corps permit action"); *id.* § 7(b)(2)(ii) (identifying one factor in determining "control and responsibility" is the "extent to which the entire project will be within Corps jurisdiction"); *id.* § 7(b)(3) (providing as an example that "if an applicant seeks a . . . permit to fill waters or wetlands on which other construction or work is proposed, the control and responsibility of the Corps, as well as its overall Federal involvement would extend to the portions of the project to be located on the permitted fill" but not to other portions unless "the regulated activities, and those activities involving regulation, funding, etc. by other Federal agencies, comprise a substantial portion of the overall project"). Given the deference that the agency's determination of its own jurisdiction is due, the Corps' decision to limit its review to the specific activity requiring the permit is not arbitrary or capricious.

b. Segmentation of Project

The Council on Environmental Quality's (CEQ) regulations implementing NEPA require that an agency consider "connected actions" and "cumulative actions" within a single EA or EIS. 40 C.F.R. § 1508.25. Although federal agencies are assigned the primary task of defining the scope of NEPA review and their determination is given "considerable discretion," connected or cumulative actions must be considered together to prevent an agency from "dividing a project into multiple `actions,' each of which individually has an insignificant environmental impact, but which collectively have a substantial impact." *Thomas*, 753 F.2d at 758.

The CEQ regulation provides that actions are "connected" if they:

> (i) Automatically trigger other actions which may require environmental impact statements. (ii) Cannot or will not proceed unless other actions are taken previously or simultaneously. (iii) Are interdependent parts of a large action and depend on the larger action for their justification.

40 C.F.R. § 1508.25(a)(1). Cumulative actions are those "which when viewed with other proposed actions have cumulatively significant impacts." 40 C.F.R. § 1508.25(a)(2).

We use an "independent utility" test to determine whether an agency is required to consider multiple actions in a single NEPA review pursuant to the CEQ regulations. In *Thomas*, we addressed the issue of whether NEPA required the

Forest Service to consider in a single review process the environmental impacts of the building of a road in a forest to facilitate logging and the timber sales that would result from that logging. We found that the logging operations and the construction of the road were "connected actions" because "the timber sales [could not] proceed without the road, and the road would not be built but for the contemplated timber sales." 753 F.2d at 759. *See also, Save the Yaak Comm. v. Block*, 840 F.2d 714, 720 (9th Cir.1988).

Applying this same analysis, we have rejected claims "that actions were connected when each of two projects would have taken place with or without the other and thus had 'independent utility.' " *Morongo Band of Mission Indians v. FAA*, 161 F.3d 569, 580 (9th Cir.1998); *see also Northwest Resource Information Center, Inc. v. National Marine Fisheries Service*, 56 F.3d 1060 (9th Cir.1995); *Sylvester*, 884 F.2d at 400. In *Morongo Band*, we found that the FAA did not improperly segment NEPA review of an airport's arrival enhancement project (AEP) from review of a larger airport expansion project, for which the FAA was preparing an EIS, because each project had independent utility. 161 F.3d at 580. We recognized that the expansion project would exacerbate the problems being addressed by the AEP, but found that the AEP was an independent action because it was designed primarily to deal with existing problems and therefore was not connected to any future expansion project. *Id.*

In this case, the Corps asserts that the three phases of the project are not connected actions because each have independent utility and that it therefore was not required to consider the environmental impacts attributable to the three different phases in a single NEPA analysis. The record supports the Corps' conclusion. Phase I of the development includes the

development of approximately 600 acres that comprise 5 million square feet of office space, 13,000 dwelling units and hotel and retail space. The utility of this part of the project does not depend upon the completion of the later phases of the project. It would not be unwise or irrational to undertake the building of Phase I even if it was determined that the later phases could not be constructed. *Trout Unlimited v. Morton*, 509 F.2d 1276, 1285 (9th Cir.1974) (finding that an EIS must cover a whole project when "[t]he dependency is such that it would be irrational, or at least unwise, to undertake the first phase if subsequent phases were not also undertaken").

Relying on *Blue Mountains*, WAN avers that, under the applicable regulations, the Corps should have considered the three phases of the project together as "cumulative actions." *Blue Mountains* involved a challenge to the Forest Service's determination that a single timber salvage sale would not have a significant environmental impact. 161 F.3d 1208 (9th Cir. 1998). We found that the CEQ regulations required the Forest Service to consider five related timber sales in a single NEPA analysis. *Id.* at 1214-16. Acknowledging that "NEPA does not require the government to do the impractical" and that the agency's determination of the scope of an EIS is entitled to deference, we nevertheless overturned the Forest Service's decision to analyze the sales separately. *Id.* at 1215 (internal quotation marks omitted). We found that the five sales were cumulative actions because they were part of a single project, were announced simultaneously to a coalition of logging companies, and were reasonably foreseeable. *Id.*

The instant case is distinguishable from *Blue Mountains*. Finding that the Corps was required in 1991-92 to have analyzed the environmental impacts of the three phases in a single EA or EIS would require the government to do the

impractical. When MTP-PV applied for a permit for Phase I, many of the details and planning decisions regarding Phases II and III had not yet been completed. In fact, Phases II and III have still not received the required authorizations to begin development from various state and federal agencies and the local government. Additionally, unlike the situation in *Blue Mountains*, the Corps did include in the EA an evaluation of the environmental impacts of the whole project. Neither the CEQ regulations nor our precedent support the conclusion that the Corps was required to consider the three phases together as cumulative actions.

3. Corps' Finding of No Significant Impact ("FONSI")

Under NEPA, if an agency determines in an EA that the federal action will not significantly affect the environment, it may issue a FONSI. *Northwest Resource Info. Ctr.*, 56 F.3d at 1064. "If the proposed action will have a significant impact, the agency must prepare an EIS which addresses in detail the purpose and need for the action, the environmental impacts of the action, and alternatives to the action." *Id.*; 40 C.F.R. §§ 1501.4 and 1502.10. CEQ's regulations require an agency to consider the context and intensity of the environmental impacts in making the determination as to the significance of the impacts. 40 C.F.R. § 1508.27. The agency must consider, *inter alia*, "[t]he degree to which the effects . . . are likely to be highly controversial" and "[t]he degree to which the possible effects . . . involve unique or unknown risks." 40 C.F.R.§ 1508.27(b)(4), (b)(5).

a. Untested Nature of Freshwater System

The district court found that the Corps' decision not

to issue an EIS was arbitrary and capricious because there were substantial questions regarding whether the proposed freshwater wetland system would adequately mitigate the loss of the filled wetlands. "An agency must prepare an EIS if 'substantial questions are raised as to whether a project . . . may cause significant degradation of some human environmental factor.'" *Greenpeace Action*, 14 F.3d at 1332 (citing *LaFlamme v. FERC*, 852 F.2d 389, 397 (9th Cir.1988)). The district court found the record replete with comments questioning the feasibility of the wetland system and noting that the Corps' conclusion that the system would result in an environmental benefit was not based on scientific data. The district court further found that the Corps largely ignored these comments and that the Corps' conclusion that the freshwater system would result in an environmental benefit was not supported by substantial evidence.

The district court's finding that there exist substantial questions regarding the feasibility of the freshwater system appears to be largely based on a mis-characterization of the evidence found in the administrative record. The record does contain many agency and public comments criticizing the freshwater system. A majority of these comments, however, do not question the feasibility of the freshwater system or indicate that the system would have negative impacts on the environment.

For example, to support its finding that both the FWS and the EPA recognized that MTP-PV's proposal to build the freshwater wetland system within the retention basin was not feasible, the district court cited comment letters submitted by the EPA and FWS. The letter from the EPA, however, does not address the feasibility of the freshwater wetland system. Rather, in its comments, the EPA requests that MTP-PV

provide the following information:

> A. Determination if the freshwater marsh will receive water from the proposed on-site water treatment facility and if so, the quantity of water.[MTP-PV] should provide an evaluation of the quantity and quality of wildlife habitat the freshwater marsh would provide if it received this treated water and if treated water was not used in the marsh.
>
> B. Determination of the contaminants which would enter the freshwater marsh if surface run-off, remediated groundwater and/or reclaimed wastewater were used. [MTP-PV] should explain how the contaminant and sediment loading in the freshwater marsh would be managed. The information provided should include the frequency and location of any sediment and vegetation removal that is expected to be required, how this will affect the quantity and quality of wildlife habitat, and where the sediment will be disposed.

Letter from Harry Seraydarian, Director, Water Management Division, EPA, to Colonel Charles S. Thomas, District Engineer, Corps (February 6, 1991). Similarly, in the referenced comment letter, FWS suggested that the plan for the freshwater system be revised to allow for urban runoff to be diverted around the system, but it did not express any opinion on the feasibility of the system.

The record in this case also belies the district court's finding that the Corps ignored the negative comments it received and that the Corps lacked a substantial basis for the scientific determination that the freshwater system is viable. The commentators who expressed concern about the feasibility of the freshwater system generally discussed the ability of the system to serve the various purposes for which it was designed, its ability to handle pollutants, and the quality and quantity of the water entering the system. The record reveals that the Corps considered each of these issues and relied on substantial evidence in making its determination that the freshwater system was feasible.

In reviewing the environmental impacts of the permit activity, the Corps considered numerous reports, studies, and comments which evaluated the feasibility of the freshwater wetland system. A review of the administrative record demonstrates that the Corps considered, *inter alia*, the biological needs of the native habitat and wildlife of the region, water quality issues related to the project, the drainage, watershed characteristics, water levels of the area, and possible flooding that may be associated with the freshwater system. The Corps' conclusion that the construction of the freshwater wetland system will result in a net environmental benefit was based on relevant and substantial data.

We have held that when the record reveals that an agency based a finding of no significant impact upon relevant and substantial data, the fact that the record also contains evidence supporting a different scientific opinion does not render the agency's decision arbitrary and capricious. *Greenpeace Action*, 14 F.3d at 1333; *cf. Foundation for North Am. Wild Sheep v. United States Dep't of Agric.*, 681 F.2d 1172, 1178 (9th Cir.1982) (finding that an agency's failure to address

"certain crucial factors, consideration of which was essential to a truly informed decision whether or not to prepare an EIS," rendered its decision that no EIS was necessarily unreasonable). "When specialists express conflicting views, an agency must have discretion to rely on the reasonable opinions of its own qualified experts even if, as an original matter, a court might find contrary views more persuasive." *Marsh*, 490 U.S. at 378, 109 S. Ct. 851; *see also Friends of Endangered Species, Inc. v. Jantzen*, 760 F.2d 976, 986 (9th Cir.1985) ("NEPA does not require that we decide whether an EIR is based on the best scientific methodology available, nor does NEPA require us to resolve disagreements among various scientists as to methodology").

Because a review of the record reveals that the Corps took a hard look at the environmental consequences of allowing MTP-PV to construct the freshwater wetlands system and the Corps based its decision to issue a FONSI on an evaluation of the relevant factors, the Corps' decision was not arbitrary and capricious.

b. Mitigating Factors

An agency's decision to forego issuing an EIS may be justified by the presence of mitigating measures. *Friends of Payette v. Horseshoe Bend Hydroelectric Co.*, 988 F.2d 989, 993 (9th Cir. 1993). "If significant measures are taken to mitigate the project's effects, they need not completely compensate for adverse environmental impacts." *Id*. (internal quotations and citation omitted). In evaluating the sufficiency of mitigation measures, we focus on whether the mitigation measures constitute an adequate buffer against the negative impacts that result from the authorized activity to render such impacts so minor as to not warrant an EIS. *Greenpeace Action*,

14 F.3d at 1332.

In the EA, the Corps found that the filling of the wetlands would not significantly effect the environment and that any negative impacts that would result would be mitigated by the creation of the 51 acre freshwater system. At the time the permit was issued, however, the complete mitigation plan had yet to be set forth with specificity. In order to avoid substantial delays, the Corps decided to issue the permit before all the details of the mitigation plan had been finalized. In lieu of a detailed plan, the Corps placed special conditions in the permit requiring MTP-PV to develop the plans according to the guidelines set forth in the special conditions. MTP-PV was prevented from commencing any work on the project until the plans were submitted to and approved by the Corps.

WAN contends that the Corps decision to issue the FONSI was arbitrary and capricious because it was based on an incomplete mitigation plan. WAN asserts that it is irrational to allege that the Corps could have made a reasoned evaluation of the effectiveness of the mitigation measures because it was impossible to determine the precise nature of the mitigation measures in the absence of a specific, finalized mitigation plan. Thus, WAN concludes, the Corps' finding that freshwater system would sufficiently mitigate the whole project was arbitrary and capricious.

WAN's analysis is flawed. WAN exaggerates the deficiencies of the mitigation evidence found in the record. A careful review of the record demonstrates that mitigation measures were developed to a reasonable degree and had been reviewed by the Corps and other federal agencies at the time the permit issued. Moreover, the special conditions included in the permit and reviewed by the various agencies were extremely

detailed. Thus, the Corps could determine the precise nature of many of the mitigation measures at the time that it made the permitting decision. *See Robertson*, 490 U.S. at 352, 109 S. Ct. 1835 ("[I]t would be inconsistent with NEPA's reliance on procedural mechanisms -- as opposed to substantive, result-based standards -- to demand the presence of a fully developed plan that will mitigate environmental harm before an agency can act.") WAN also exaggerates the need for mitigation here. The record supports the Corps' finding in the EA that the scattered wetlands to be filled pursuant to the permit are of a highly degraded quality and that little wetland value would be lost as a result of the Phase I filling activity. Due to the value of the freshwater system, the Corps found that the development of Phase I would increase the wetland values of the area. The record supports these findings.

In order to issue a FONSI, the Corps only needed to find that the mitigation measures would render any environmental impact resulting from the permit activity insignificant. The Corps did not act arbitrarily and capriciously in determining that an EIS was not required for MTP-PV's application to fill 16 acres of degraded wetland given the mitigating value of the freshwater system.[8/]

c. Public Controversy

WAN asserts that the controversy surrounding the decision to build the freshwater wetland system required the

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[8/]The memorandum from the Corps' former project manager to her replacement, expressing her concern that the mitigation plans were not further developed, does not undermine our conclusion that the mitigation measures in the record were reasonably developed, that the special conditions were detailed, and that the approval of the Corps' District Engineer based thereon was not arbitrary or capricious.

Corps to prepare an EIS. "The existence of a public controversy over the effect of an agency action is one factor in determining whether the agency should prepare [an EIS]. "*Greenpeace Action*, 14 F.3d at 1333, 40 C.F.R. § 1508.27(b)(4). A federal action is controversial if "a substantial dispute exists as to [its] size, nature or effect." *LaFlamme*, 852 F.2d at 400-01 (internal quotation marks omitted). The existence of opposition to a use, however, does not render an action controversial. *Id.* at 401.

A majority of the objections raised to the development of the freshwater wetland system were premised on an opinion that it would be more appropriate to use the area as a saltwater marsh or that the geographic location of the marsh should be altered. These types of objections can not render a Corps' permitting decision controversial for NEPA purposes because they do not pertain to the "size, nature, or effect" of the development of the freshwater system. As was noted above, however, a dispute as to the effect that the freshwater system would have on the environment did exist. During the two year review process, the Corps was able to address these potential effects to the satisfaction of the other federal resource agencies, for all of the agencies eventually withdrew their objections to the issuance of the permit. *See Northwest Environmental Defense Center*, 117 F.3d at 1536. The Corps did not commit a clear error in judgment when it determined that this action was not controversial for NEPA purposes.

CONCLUSION

MTP-PV does not have a legally protectable interest relating to WAN's NEPA claims and therefore the district court did not err in denying MTP-PV's motion to intervene as of right in regard to these claims. The district court erred, however, in

finding that, in issuing the permit without preparing an EIS considering the environmental consequences of building the entire Playa Vista project, the Corps violated NEPA. The Corps' determination of the scope of the NEPA review and its issuance of a FONSI was not arbitrary and capricious. Accordingly, we reverse the district court's grant of summary judgment and remand to vacate the injunction.

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.

NOT FOR PUBLICATION
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

WETLANDS ACTION NETWORK, a California non-profit organization; BALLONA WETLANDS LAND TRUST, a California non-profit organization, *Plaintiffs-Appellees,* vs. UNITED STATES ARMY CORPS OF ENGINEERS, an agency of the United States; MICHAL R. ROBINSON, in his capacity as District Engineer of the United States Army Corps of Engineers; JOE N. BALLARD, in his capacity as Chief Engineer of the United States Army Corps of Engineers, *Defendants,* and PLAYA CAPITAL COMPANY, L.L.C., as successor-in-interest to Maguire Thomas Partners-Playa Vista, *Defendant-Intervenor-Appellant.*	)	No. 98-56242 D.C. No. CV-96-08407-RSWL **FILED** **JAN 10 2001** **Cathy A. Catterson** **Clerk, U.S.** **Court of Appeals**
WETLANDS ACTION NETWORK, a California non-profit organization; CALIFORNIA PUBLIC INTEREST RESEARCH GROUP, *Plaintiffs-Appellants,* and	)	No. 98-56474 D.C. No. CV 96-08407-RSWL

BALLONA WETLANDS LAND TRUST, a California non-profit organization,

Plaintiff,

vs.

UNITED STATES ARMY CORPS OF ENGINEERS, an agency of the United States; MICHAL R. ROBINSON, in his capacity as District Engineer of the United States Army Corps of Engineers; JOE N. BALLARD, in his capacity as Chief Engineer of the United States Army Corps of Engineers,

Defendants,

and

PLAYA CAPITAL COMPANY, L.L.C., as successor-in-interest to Maguire Thomas Partners-PlayaVista,

Defendant-Intervenor Appellee.

WETLANDS ACTION NETWORK, a California non-profit organization; BALLONA WETLANDS LAND TRUST, a California non-profit organization; CALIFORNIA PUBLIC INTEREST RESEARCH GROUP,

Plaintiffs-Appellants,

vs.

UNITED STATES ARMY CORPS OF ENGINEERS, an agency of the United

No. 98-56672
D.C. No. CV-96-08407-RSWL

States; JOE N. BALLARD, in his capacity as Chief Engineer of the United States Army Corps of Engineers; ROBERT L. DAVIS, Col.,

Defendants-Appellants.

Before: BRUNETTI, WARDLAW, Circuit Judges, and SEDWICK,[1] District Judge.

Judge Wardlaw has voted to deny appellees' petition for rehearing and to deny the petition for rehearing en banc. Judges Brunetti and Sedwick have voted to deny the petition for rehearing and recommend denial of the petition for rehearing en banc.

The full court has been advised of the petition for rehearing en banc and no active judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

The petition for rehearing and the petition for rehearing en banc are denied.

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[1]The Honorable John W. Sedwick, United States District Judge for the District of Alaska, sitting by designation.

UNPUBLISHED OPINION OF THE DISTRICT COURT

Entered Clerk, U.S. District Court
Jun 26 1998
Central District of California by Deputy

Filed Clerk, U.S. District Court
Jun 25 1998
Central District of California by Deputy

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

WETLANDS ACTION NETWORK, a California non-profit organization; BALLONA WETLANDS LAND TRUST, a California non-profit organization; CALIFORNIA PUBLIC INTEREST RESEARCH GROUP, a California non-profit organization,	) CV 96-8407) RSWL (AJWx))) ORDER GRANTING IN) PART AND DENYING IN) PART PLAINTIFFS') MOTION TO AUGMENT) THE ADMINISTRATIVE) PLAINTIFFS' MOTION
Plaintiffs,	) FOR SUMMARY
v.	) JUDGMENT, AND
UNITED STATES ARMY CORPS OF ENGINEERS, an agency of the United States; LT. GENERAL JOE N. BALLARD, in his capacity as Chief Engineer of the United States Army Corps of Engineers; and COL. MICHAL R. ROBINSON, in his capacity as District Engineer of the United States Corps of Engineers,	) DENYING) DEFENDANTS') MOTION FOR) SUMMARY JUDGMENT))) THIS CONSTITUTES) NOTICE OF ENTRY) AS REQUIRED BY
Defendants.	) FRCP, RULE 77(d)
MAGUIRE THOMAS PARTNERS PLAYA VISTA,	)
Intervenor	)

I.

Introduction

This action arises out of Plaintiffs' Wetlands Action Network, Ballona Wetlands Land Trust, and California Public Interest Research Group ("Plaintiffs") allegations that the Army Corps of Engineers (the "Corps") and its supervisory officers (collectively "Defendants") failed to fulfill their legal obligations under the National Environmental Policy Act ("NEPA") and the Clean Water Act ("CWA") by granting a fill permit to Maguire Thomas Partners-Playa Vista ("MTP-PV")[1/] 1 under section 404 of the CWA. (Permit #90-426-EV, hereinafter "the Permit".)

Currently before the Court are three motions: Plaintiffs' Motion to Augment the Administrative Record, and the Parties' Cross-Motions for Summary Judgment as to the remaining NEPA claim. These motions were scheduled for oral argument on February 23, 1998, but were removed from the Court's calendar for disposition based on the papers filed pursuant to Federal Rule of Civil Procedure 78. Now, after carefully reviewing the papers submitted, the Court **GRANTS** in part, and **DENIES** in part, Plaintiffs' Motion to Augment the Administrative Record. The Court further **GRANTS** Plaintiffs' Motion for Summary Judgment and **DENIES** Defendants' Motion for Summary Judgment.

[1/] Playa Capital Company, L.L.C. is the successor-in-interest to MTP-PV, and is the owner of the property upon which the Playa Vista project is proposes. For the purposes of this Order, however, the Court will refer to the developer as MTP-PV because it was the developer at the time of the Permit process.

II.

Background

In August, 1990, MTP-PV applied to Defendants for a permit to fill approximately 16.1 acres of federally-delineated wetlands pursuant to a major development project in the Ballona Wetlands area of Los Angeles.[2/] The Playa Vista property is a parcel of approximately 1004 acres in Los Angeles, bounded by Marina del Rey, the Marina Freeway, the San Diego Freeway, and the Los Angeles International Airport. The mixed-use development, known as Playa Vista, is to include residential areas, a marina, and numerous commercial developments, including hotels, retail establishments, and a movie studio.

Prior to issuing the Permit, the Corps was required to

[2/] MTP-PV divided the Playa Vista property into four qudrants: Areas A, B, C, and D. The Playa Vista project itself is then divided into three phases. The first phase involves, in part, the construction of 80,000 square feet of office space and 450 residential units in Areas B, C, and D of the Playa Vista property, which contain 17 isolated patches of allegedly degraded wetlands. The second phase involves the restoration of a 230-acre salt marsh system within Area B. The third phase involves the development of a marina in Area A and associated commercial and residential space and, possibly, improvements to the Ballona Channel.

The Permit at issue in this case covers only the filling in of the federally delineated wetlands proposed as part of the construction of the Playa Vista project. This Phase I permit authorized: fill of approximately 16.1 acres of wetlands and the establishment of mitigation credits for total dredge/fill of approximately 28.1 acres of delineated wetlands. In addition to the 16 acres of wetlands affected in this permit, these credits were to be granted in advance for the 9.8 acres of wetlands proposed to become the saltwater marina development, and 2.3 acres for the relocation of Culver Boulevard.

analyze the environmental effects of each stage's permitted activity, pursuant to NEPA. If they determined that the permitted activity would have a "significant impact" on the environment, they were required to issue a detailed Environmental Impact Statement ("EIS") before granting a permit. If no significant environmental impacts were found, Defendants were required to issue a Finding of No Significant Impact ("FONSI") and an Environmental Assessment ("EA") which is much less detailed than an EIS.

On July 1, 1992, Defendants issued the Permit to MTP-PV, allowing it to begin the first phase of filling operations. Defendants did not issue an EIS, but instead issued a FONSI and an EA pertaining to the Permit. Later, Defendants required that both the second and third stages of the Playa Vista project be preceded by an EIS.

Plaintiffs filed their Complaint with the Court on December 3, 1996, followed by a First Amended Complaint on February 19, 1997. Defendants filed their Answer on March 31, 1997, and filed a copy of the administrative record on May 1, 1997. In an August 20, 1997, Order, the Court allowed MTP-PV leave to intervene permissively in the portion of the NEPA proceedings addressing injunctive relief, and as of right in the entirety of the CWA claim. The Court subsequently granted summary adjudication in favor of Defendants on the CWA claim by an order dated November 14, 1997.

Plaintiffs originally brought five claims, the first four alleging NEPA violations, and the fifth alleging a violation of the CWA. Plaintiffs claim that Defendants failed to follow their statutory mandate under NEPA by not issuing an EIS before granting the first permit to MTP-PV. Plaintiffs request injunctive relief to revoke the Permit and to cease all construction at the site until an EIS is issued.

III.

Discussion

A. Plaintiffs' Motion to Augment the Administrative Record

In connection with their motion for summary judgment, Plaintiffs move to augment the administrative record with the declarations of Drs. Joy Zedler and Rudi Mattoni, filed on October 17, 1997. Plaintiffs also move to augment the record with portions of various declarations submitted by MTP-PV (intervenor) and Friends of Ballona Wetlands ("FBW," applicants for intervention). Finally, Plaintiffs move the Court to compel the Corps to produce four witnesses for examination to augment the administrative record with their testimony about the period of time between July, 1992, and April, 1993.[3/]

1. Legal Standard: Judicial Review and Augmenting the Administrative Record

A court's review of an agency decision usually "focuses on the administrative record in existence at the time of the decision and does not encompass any part of the record that is made initially in the reviewing court." Public Util. Comm'n of State of Calif. v. F.E.R.C., 100 F.3d 1443, 1450 (9th Cir. 1996) (citing Camp v. Pitts, 411 U.S. 138, 142, 93 S. Ct. 1241, 1244 (1973); Nevada Land Action Ass'n v. United States Forest

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[3/] In previous Orders, the Court stated that the exceptions to the rule limiting the Court's review to only the administrative record were "not applicable here." This statement did not mean that no exceptions did in fact exist, only that neither party in the previous Orders properly moved to have the Court expand its review beyond the administrative record.

Serv., 8 F.3d 713, 718 (8th Cir. 1993)); see also Friends of the Earth v. Hintz, 800 F.2d 822, 829 (9th cir. 1986); 5 U.S.C. § 706 (the Administrative Procedures Act, ("APA")). A court may expand the scope of its review beyond the record, however, if to do so is needed to "explain agency decisions." Id. (citing Animal Defense Council v. Hodel, 840 F.2d 1432, 1436 (9th Cir. 1988), corrected, 867 F.2d 1244 (9th Cir. 1989)). The Ninth Circuit has allowed materials outside the record may be admitted:

> (1) if necessary to determine 'whether the agency has considered all relevant factors and has explained its decision,' (2) 'when the agency has relied on documents not in the record,' or (3) 'when supplementing the record is necessary to explain technical terms or complex subject matter.'

Inland Empire Pub. Lands Council v. Glickman, 88 F.3d 697, 703-04 (9th Cir. 1996) (Quoting Friends of the Payette v. Horseshoe Bend Hydrooelectric Co., 988 F.2d 989, 997 (9th Cir. 1993)). Finally, "[e]xtra-record documents may also be admitted 'when plaintiffs make a showing of agency bad faith.' Public Until. Comm'n, 100 F.3d at 1450 (quoting National Audubon Soc. v. United States Forest Serv. 46 F.3d 1437, 1447 n.9 (9th Cir. 1993)).

2. Plaintiffs' Motion to Augment the Administrative Record

a) Doctors Mattoni's and Zedler's Declarations

Dr. Mattoni is a professor of conservation biology with a concentration in ecology and genetics. Dr. Zedler is a professor of biology and director of the Pacific Estuarine

Research Laboratory at San Diego State University. Their declarations allegedly explain technical terms at issue and put the scientific debates into context. Further, Dr. Mattoni's declaration allegedly contains evidence that should have been in, but was not clearly reflected in, the administrative record, except in the most cursory, cryptic manner.

Defendants argue that to allow Plaintiffs to now submit these declarations would essentially "forgive" Plaintiffs for failing to submit the declarations of these experts during the Corps' NEPA process and before the agency rendered its decision. Defendants claim that there are no "technical terms," "scientific debates," "widespread, strongly-held, and long-standing concerns," or "cursory, cryptic" issues relating to the Corps' decision to issue the permit that the court would be unable to understand based on a review of the administrative record.[4/]

[4/] Defendants argue that if "the Court were to need technical assistance or further explanation of the Corps' decision or the record, the Court should seek such assistance and explanation from the Corps, not plaintiffs." (Opp. at 19) (emphasis added).

"When there is a need to supplement the record to explain agency action, the preferred procedure is to remand to the agency for its amplification . . . ." Public Power Council v. Johnson, 674 F.2d 791, 794 (9th Cir. 1982) (citing ASARCO, Inc. V. EPA, 616 F.2d 1153, 1160 (9th Cir. 1980); Appalachian Power Co. v. EPA, 477 F.2d 495, 507 (4th Cir. 1973)). The court may, however, admit certain testimony into the judicial proceeding or provide limited discovery "when serious gaps would frustrate challenges to the agency's action." Id. (citations omitted). Moreover, a court need not remand to the agency when other exceptions to limiting review to the administrative record apply, such as when an agency has relied on documents or materials not included in the record, or to permit explanation or clarification of technical terms or subject matter involved in the agency action being reviewed. Id.; see also Hintz, 800 F.2d at 829.

The mere fact that controversy surrounded the Permit process, however, does not mean that the record should be augmented. Plaintiffs' other offered reasons to augment the administrative record are also unpersuasive. For example, Plaintiffs cite to no technical terms that need to be further elaborated, upon for the Court's review, or which the Court could not understand, simply by referring to the administrative record. Furthermore, the administrative record adequately explains the concerns as to this project, expressed by professionals, the relevant reviewing agencies, and the public. The Court will consider these declarations, however, to the extent they assist the Court in determining whether the agency considered relevant factors or explained its decision adequately. See Northwest Envtl. Defense Ctr. v. Wood, 947 F. Supp. 1371, 1376 (D. Or. 1996) (citing Greenpeace Action v. Franklin, 14 F.3d 1324, 1334 n.12 (9th Cir. 1992)).

b) Robert Miller, Thomas S. Ricci, and Howard F. Towner Declarations

The declarations of Robert Miller (MTP's Vice President), Thomas S. Ricci (Playa Capital Company's Vice President), and Howard F. Towner (FBW's Biological Expert) were submitted earlier in this litigation in opposition to Plaintiffs' Motion for a Preliminary Injunction, and Plaintiffs now move to admit them as part of the record. These declarations allegedly contain admissions that are central to Plaintiffs' NEPA claims. Plaintiffs claim that they demonstrate that: (1) the freshwater mitigation system and the upland mixed-use development of Playa Vista are significantly linked in terms of NEPA requirements; and (2) enormous controversy within the scientific community exists as to the adequacy, design, and likelihood of success of the "freshwater system."

Defendants argue that these declarations should not be

admitted because Plaintiffs have not presented a legally sufficient basis for admitting this extra-record evidence in that they have not satisfied the exceptions to judicial review listed above. Further, Defendants argue that Plaintiffs are trying to use these declarations in an inappropriate and impermissible manner because FBW and MTP-PV submitted these declarations in opposition to Plaintiffs' Motion for a Preliminary Injunction. Defendants claim, however, that they are not for Plaintiffs' use to attack the integrity of the Corps' NEPA and permit evaluation process or its decision to issue the permit.

Defendants are correct in that Plaintiffs do not try to fit these declarations into one of the exceptions for augmenting the administrative record, but rather to substantively attack the Corps' decision. However, to the extent the Court finds that they help explain agency action or whether the Corps considered relevant factors, the Court will consider them.

c) Production of Witnesses by the Corps

Plaintiffs ask that the Corps be ordered to produce four witnesses - Liz Varnhagen, Cheryl Conel, David Castanon, and Diane Noda - to testify about alleged irregularities in the administrative record and significant gaps in the record between July, 1992, and April, 1993. These witnesses were involved with the Permit's issuance. Because of the alleged lack of documentation in the record, Plaintiffs request that the Corps be ordered to augment the record through testimony garnered at an evidentiary hearing of those Corps officials.[5/]

[5/] The specific irregularities in the record to which Plaintiffs refer are: (1) the lack of administrative record for the time period between July, 1992, when the Permit was first issued, and April, 1993, when it was finalized (hereinafter the "gap in the record issue"); and (2) the fact that the Special

On July 1, 1992, Colonel Thomas, the Corps' District Engineer, signed and sent out the section 404 Permit to MTP-PV on his last day in office. (8 AR 3713-24.) This document is referred to in the administrative record as a "draft" permit. The letter accompanying this permit required that the permit be signed and returned, along with a one hundred dollar check, to the Corps within thirty days or the request for the proposed work would be withdrawn. (8 AR 3712.)

In addition to signing the Permit in July, 1992, Colonel Thomas and other Corps officials certified the EA and FONSI for phase I of the Playa Vista project. (8 AR 3725.) Contained within the EA was a list of Special Conditions which, presumably, should have been the same as those accompanying the Permit signed on the same day. (8 AR 3782.) The Special Conditions contained in the EA differ, however, from those in the Permit.[6] Further, because the final permit was not signed

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Conditions in the EA and the Permit differed when they were first issued in July, 1992 (hereinafter the "attached documents language issue").

[6] Section 2(c) of the EA required:

> During Year 1 the planting density for each plant community shall be at least 80% of that proposed in the schematic revegetation plan provided in the attached revegetation plan that accompanies this permit, as specified by Special Condition 2.b., above.

(8 AR 3784) (emphasis added).

However, in the final version of the Permit, section 2(c) states:

> During Year 1 the planting density for each plant community will be at least 80% of that proposed in the revegetation plan as specified by Special Condition 2.b., above. . . .

(8 AR 3719.)

and returned until April 16, 1993, there is a nine month gap in the administrative record, according to Plaintiffs. (8 AR 3835.)

To explain the alleged gap in the record and the attached documents language issue, Defendants offer the declarations of two Corps' officials: David J. Castanon ("Castanon") and Liz

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Section 5(c) of the EA states:

> The permittee shall submit to the Corps for review a summary monitoring report within 6 months of the end of the fifth complete year following the completion of the construction of each component of the wetlands system. Such report shall contain the following information:
>
> > An evaluation of water quality parameters as measured by seasonal water quality sampling and water chemistry analysis for which the required sampling regimes and key water quality parameters are described in the water quality monitoring section of the attached mitigation document accompanying this permit as prescribed in 2.c. above.

(8 AR 3786) (emphasis added).

Yet, Section 5(c) of the Permit states:

> The permittee shall submit to the Corps for review a summary monitoring report within 6 months of the end of the fifth complete year following the initiation of the construction of the wetland systems. Such report shall contain the following information:
>
> > An evaluation of water quality parameters as measured by seasonal water quality sampling and water chemistry analysis for which the required sampling regimes and key water quality parameters are described in the water quality monitoring section as described in 2.c, above.

(8 AR 3722.)

Varnhagen ("Varnhagen"). Defendants claim that these declarations explain the alleged irregularities in the record and obviate the need to augment the record.

i. The Gap in the Record Issue

Defendants offer Castanon's declaration to explain the alleged gap in the record issue. As Chief of the North Coast Section of the Regulatory Branch of the Corps, he participated in the Corps' administrative decision-making process for the Permit. He also directed the compilation of the agency documents which comprise the administrative record for the Corps' decision to issue the Permit.

Castanon states that the July 1, 1992, letter accompanying the issuance of the Permit referred to the Permit as "draft" because the Corps does not consider the permits final until they are signed by both the Corps and the permittees. He states that this "draft" reference did not mean that the Corps was intending to make further significant changes to the permit without public knowledge and input. He also states that the 30-day deadline established in the letter was discretionary, not required by law, and merely to ensure the quick turn-around of permits.

As to why the Permit was not signed until April, 1993, Castanon states that on July 10, 1992, MTP informed the Corps in writing that there were errors in the Permit Special Conditions. (8 AR 3791.)[7/] He blames this error on the fact that Varnhagen had prepared several different iterations of the Permit Special Conditions on a floppy disk, and in her haste to

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[7/] These errors related to Special Conditions #1 and #6(a). (8 AR 3791-92.) This alleged error in the Permit's Special Conditions differs from the error Plaintiffs discuss, i.e., the attached documents language problem.

assemble the necessary documents for approval, she simply selected the wrong iteration of the Special Conditions for inclusion with the Permit that the Corps sent to MTP.

Varnhagen, and then her successor Noda, both worked on correcting the Special Conditions in the Permit, Castanon claims, but the task eventually fell on him. From July, 1992, to April, 1993, then, these three individuals, at different times, allegedly worked with MTP to correct the Permit's Special Conditions. However, Defendants cite to no evidence in the record evidencing these transactions.

Castanon claims to have completed correcting the Special Conditions in April, 1993. MTP then allegedly incorporated the corrected Special Conditions, signed the Permit, and sent the signed Permit package to the Corps. When Castanon received the package, he claims to have replaced the uncorrected version of the Special Conditions that had been in the Permit file, (dated July 1, 1992), with the corrected version of the Special Conditions (dated April 16, 1993). Defendants claim that this substitution and disposal created the "gap" in the record to which Plaintiffs refer.

Castanon states that he disposed of the copy of the older conditions because he wanted to avoid confusion from having the corrected and uncorrected iterations of the permit Special Conditions together in the permit file. Moreover, Defendants argue that a side-by-side comparison of the uncorrected and the corrected iterations of the Permit Special Conditions reveals that the word changes between the two iterations are minor, non-substantive differences. The Corps argues that had it made substantive modifications to the Special Conditions, it would have documented the modifications and re-submitted the permit for public review and comment, as required by the Corps' regulations. Castanon further states that he did not correct or

otherwise disturb the language of the EA, including the Special Conditions.

Plaintiffs claim that Castanon's declaration is unpersuasive. Castanon certified the accuracy and completeness of the administrative record on April 29, 1997. Yet in his certification, he fails to refer to the fact that he "threw away the uncorrected version [of the Special Conditions] because he thought that the uncorrected version was no longer needed." (See Castanon Decl. ¶ 22.) The Court finds that the Castanon declaration adequately explains the gap in the record. Plaintiffs do not challenge the contention that the changes allegedly made to the Permit itself during this time are non-substantive, and the Corps' failure to properly keep paperwork as to insignificant changes does not warrant the augmentation of the administrative record through testimony.

ii. The Attached Documents Language Issue

Plaintiffs claim that the EA which the Corps issued with the Permit relied on attached documents which did not exist when the EA was certified. Defendants submit Varnhagen's declaration to explain the "attached documents" language problem. Allegedly, the conditions outlined in the EA differ from the Permit's conditions because Varnhagen made inadvertent mistakes as to the "attached" mitigation documents language, in her "rush" to prepare and finalize the permit and associated documentation, including the EA, for the approval and signature of the District Engineer on his last day in office. (Opp. at 23.) Specifically, Varnhagen claims that Special Conditions 2.c and 5.c in the EA issued with the Permit in July, 1992, should not have referred to any "attached documents" whatsoever. She states that the Corps had intended, during the permit evaluation, to have the mitigation documents attached to

the permit. (Varnhagen Decl. ¶10.) However, Varnhagen claims that the Corps changed this intention sometime before the permit was issued in July, 1992. She does not know when this decision was made, except that she presumes that it must have been before June 5, 1992, the date of the Corps' response, (8 AR 3691), to the FWS' comment letter, (8 AR 3683), on the Corps' second Notice of Intent to issue the permit[2/] (7 AR 3718-24.) Varnhagen believes she must have used a version of the Special Conditions for the EA that had been superceded by subsequent language modifications prior to the Corps' decision to issue the Permit. She claims to have had several versions of the Special Conditions on a floppy disk because there were numerous modifications to the Special Conditions' language during the permit evaluation. (Varnhagen Decl. ¶10.)

Varnhagen's current declaration conflicts with a memorandum she wrote in November, 1992, to Noda, her successor, as to the language discrepancies in the EA and the Permit issued in July, 1992. (See NOL at Tab 6.) Varnhagen, the project manager for Playa Vista at the Corps, wrote the 1992 memorandum at least four months after the Permit was signed. Plaintiffs claim that it contains certain admissions with respect to deficiencies with the Permit and process. For example, in 1992, Varnhagen wrote that in the list of conditions to the Permit "there are two places which reference attached documents" to the permit. These attached documents do not exist yet and that is essentially the problem." (8 AR 3826.) If she had in fact merely selected the wrong copy of the EA from her floppy disk, as she now claims many years after the fact, it is unclear why she did not simply state this in her 1992, letter

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[2/] In their response to the Corps' Second Notice, FWS states its concern that the attached mitigation documents have not been submitted or reviewed. In response, the Corps indicates that it intends to issue the Permit without requiring that these documents be attached.

to Noda. In fact, at one point she discusses how to reconcile the differences and suggests merely deleting the references in 5.c and 2.c to "attached" mitigation documents. (8 AR 3828.) However, she does not suggest this deletion because of her inadvertence in selecting the incorrect EA. Rather, she thought this "would be the simplest course of action and the applicant/permittee would be immensely grateful." (8 AR 3828.) She even suggests the possibility of attaching a proposed revegetation plan that was included in the permit application to be included with the permit "as though it has been accepted by the Corps preliminarily. Or we could circulate it to the agencies and ask for their comments - all before the permit is finalized. (That might not be trivial and consume a lot of time)." (8 AR 3828.) Clearly, it would have been simpler for Varnhagen to have admitted her selection of the wrong EA instead of suggesting the myriad of ways to correct the failure to have the "attached documents language" in the issued Permit.

Further, Plaintiffs argue that because the EA references attached materials that were, in fact, never attached, it is reasonable to assume either that the Corps officials relied on documents that were never in the record, or that they assumed that these documents would exist when they issued the FONSI. Varnhagen's memorandum, Plaintiffs argue, points to the latter. Plaintiffs claim that if this is correct, then it lends considerable weight to Plaintiffs, contention that the decision not to prepare an EIS was arbitrary and capricious because the EA did not consider the significant impacts of the "freshwater system." Regardless, Plaintiffs claim that the lack of clarity with regard to the "attached" documents warrants explanation on the record.

Castanon attacks the importance of the November 2, 1992, Varnhagen memorandum, claiming that it merely reflects

Varnhagen's personal opinions, and not the official position of the Corps regarding the Permit. (Castanon Decl. at 15.) These inadvertent mistakes, the Corps argues, do not rise to the level of bad faith or improper behavior by the Corps. Moreover, Castanon states that the Corps' decision to allow MTP to develop the comprehensive mitigation plan after issuance of the permit but before the commencement of construction is set forth in the decision document, the final permit conditions, and the District Engineer's June 5, 1992, letter. (See 8 AR 3780-24, 3693-94 (June 5, 1992, letter).)[9/]

Plaintiffs argue that the Castanon and Varnhagen declarations are post-hoc rationalizations and should not be received. Plaintiffs argue that these are one-sided declarations that afford Plaintiffs no opportunity to interrogate the relevant witnesses in order to uncover the truth. Plaintiffs want their actual testimony, and the opportunity to cross examine them.

The Court finds that the Corps and resources agencies knew when the Corps issued the Permit that the attached documents referenced in the EA would not be attached. The position matrix prepared by the Corps (7 AR 3365), Varnhagen's memorandum to Noda, the FWS' response letter to the Corps' Notice of Intent to Issue the Permit stating that the resources agencies had not reviewed or approved the mitigation and monitoring documents, (8 AR 3683), and the Corps' response to it (8 AR 3691), all indicate that the Corps and resource agencies were aware that the Permit was being issued without the referenced attached mitigation documents. How the Corps made the decision to not require these mitigation documents, and how it issued a FONSI without them, is more

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[9/] The fact that it is "allowed" in these documents does not explain how or why the Corps made this decision or how it issued a FONSI without reviewing these documents.

appropriately discussed below in the Court's discussion of Plaintiffs' Motion for Summary Judgment, as it speaks to the arbitrary and capricious manner in which this decision was made. Finally, because Castanon's and Varghagen's declarations shall be admitted to explain agency action,[10] and because the administrative record otherwise allows the Court to review the Corps' decision to issue the Permit, further examination of the Corps' witnesses is not justified.

d) Plaintiff's Purported Evidence to Support a "Strong Showing" of Agency Bad Faith

Plaintiffs claim that the administrative record should be augmented because the agency acted in bad faith. If there is a "strong showing" of agency bad faith, the Court may accept new evidence in making its decision. Environment Now! v.

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[10] The Court recognizes that "[a]gency documents prepared during and in response to litigation are generally excluded from [review of agency action]." Kunaknana v. Clark, 742 F.2d 1145, 1149 (9th Cir. 1984) (Citing Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402, 419-20, 91 S. Ct. 814, 825 (1971); ASARCO, Inc. v. United States Env. Protection Agency, 616 F.2d 1153, 1158-61 (9th Cir. 1980)). However, exceptions to this rule exist. For example, a district court may consider information outside the administrative record if used "as 'background information' and for 'ascertaining whether the agency considered all the relevant factors or fully explicated its course of conduct or grounds for decision.'" Id. (quoting ASARCO, 616 F.2d at 1160). Thus, "[c]onsideration of the evidence to determine the correctness or wisdom of the agency's decision is not permitted." Id. at 1160. The Court is not to undertake its own inquiry in to the merits of the agency action. Id. However, the Court may examine materials that explain the original record as long as they contain no new rationalizations, i.e., they do not present new reasons post-litigation to justify the agency's decision. Id. at 1159; see also Association of Pac. Fisheries v. Envtl. Protection Agency, 615 F.2d 794, 811-12 (9th Cir. 1980).

Espy, 877 F. Supp. 1397, 1403 (E.D. Cal. 1994) (citing Hodel, 840 F.2d at 1437). As evidence, Plaintiffs notes that Colonel Thomas signed and sent the Permit on his last day, and reference a note by Cheryl Conel dated July 22, 1996, on a copy of the Corps, July 1, 1992, permit transmittal letter to MTP-PV. Plaintiffs also state that the Corps "took at face value and without independent review numerous reports and documents provided by MTP." (Mot. at 10.) This evidence does not lead the Court to conclude that the agency acted in bad faith and thus does not justify the augmentation of the administrative record. In particular, Plaintiff fails to explain its reference to Ms. Conel's note, which was written post-decision and thus not part of the administrative record. Moreover, there is nothing inherently illegal about Colonel Thomas' signing the Permit on his last day in office.

B. Plaintiffs' and Defendants' Cross Motions for Summary Judgment

Both "Parties have moved for summary judgment on Plaintiffs' NEPA claim. Finding no need to hold an evidentiary hearing or to otherwise allow augmentation of the record, the Court may now decide whether Summary Judgment should be granted.

Plaintiffs argue that the Corps' failure to prepare an EIS to analyze and disclose (1) the serious environmental impacts of the entire Playa Vista development[11] and, (2) the adverse

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[11] One of Plaintiffs' main arguments is that because the filling of wetlands for the purpose of constructing the mixed-use development is the "specific activity requiring a [section 404] permit," and because both are "links in the same chain," the overall impacts of the development should have been evaluated in an EIS. The decision not to prepare an EIS, therefore, was arbitrary, capricious and not in accordance with NEPA. (Pltf. Mot. at 27.)

impacts of the "freshwater riparian system" was arbitrary, capricious and not in accordance with law.[12/] Defendants also move for summary judgment, claiming that it properly determined that it did not need to prepare an EIS before issuing the Permit.

1. Legal Standard: Summary Judgment

Summary Judgment is appropriately granted for a moving party "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). The substantive law determines which facts are material. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248, 106 S. Ct. 2505, 2510 (1986). A dispute about a material fact is "genuine" "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." Id. In ruling on a motion for summary judgment, the Court's function is not to weigh the evidence, but only to determine if a genuine issue of material fact exists. Id.

[12/] Plaintiffs claim that the Corps took MTP's assertions at face value without any independent scientific inquiry, even though a "storm" of protests by resource agencies, private biologists, and ecologists existed. Plaintiffs further claim that both the EA and the response to the public comments contained therein were drafted almost verbatim from documents created by MTP's lawyers and consultants. (See 6 AR 2957; 5 AR 2090-2166, 2044.) This was improper because the Corps was required to "independently evaluate" such statements. 42 U.S.C. § 4332(2)(D)(III); Sierra Club v. United States Army Corps of Engineers, 701 F.2d 1011, 1024-25 (2nd Cir. 1983) (holding that the Corps must deliberate itself as to the relevant facts and the environmental impacts).

2. Standard of Judicial Review

The Corps' decision to not prepare an EIS will not be disturbed unless the Court finds it to be "arbitrary, capricious, and abuse of discretion, or otherwise not in accordance with law." APA, 5 U.S.C. § 706(2); California Trout v. Schaefer, 58 F.3d 469, 473 (9th Cir. 1995); Greenpeace, 14 F.3d at 1331. This is a highly deferential standard which requires that the court ensure that the agency took a "hard look" at the proposed action's environmental consequences, examining the record to determine if the agency decision is "'founded on a reasoned evaluation "of the relevant factors."'" Id. (quoting Marsh v. Oregon Natural Resources Council, 490 U.S. 360, 373-74, 378, 109 S. Ct. 1851, 1859 (1989)) (quoting Overton Park, 401 U.S. at 416, 91 S. Ct. at 824)). Once the court is satisfied that the "agency's exercise of discretion is truly informed," the Court must defer to that informed discretion. Id. (citing Kleppe v. Sierra club, 427, U.S. 390, 412 (1976)). A reviewing court will only overturn if there has been a "clear error of judgment." California Trout, 58 F.3d at 473. Such error will not be found if the agency "'considered the relevant factors and articulated a rational connection between the facts found and the choice made.'" Friends of Endangered Species, Inc. v. Jantzen, 760 F.2d 976, 982 (9th Cir. 1985) (quoting Baltimore Gas & Elec. Co. v. Natural Resources Defense Council, Inc., 462 U.S. 87, 105 (1983)); Northwest Coast Envtl. Ctr. v. Glickman, 136 F.3d 660, 666 (9th Cir. 1998).

3. Plaintiffs' Motion for Summary Judgment

a) The Corps Decision Not to Analyze the Entire Playa Vista Project

Plaintiffs claim that the Corps improperly segmented the Playa Vista project and that the filling of wetlands and the

Playa Vista mixed-use development project are sufficiently related such that the Corps should have considered them together in a single EIS. Plaintiffs claim that the Corps' sole reasons for not preparing an EIS which addressed the overall impacts of Playa Vista was its determination that its NEPA obligations did not extend to the "upland" portions of the project because "development could occur in those areas regardless of whether [the] permit application is granted." (Pltf.'s Mot. at 23; 8 AR 3769.) This conclusion, Plaintiffs argue, is contrary to NEPA and is the result of the Corps' erroneous decision to take at face value without independent inquiry the applicant's conclusions of fact and law. (See 3 AR 1426.) The Corps' decision not to Prepare an EIS, despite the significant impacts was, according to Plaintiffs, arbitrary, capricious, and not in accordance with NEPA. (Pltf. Mot. at 27.)

Moreover, Plaintiffs argue that both MTP and the Corps admitted repeatedly that the specific activity requiring a section 404 permit is the Playa Vista mixed-use development and that filling delineated wetlands is necessary to facilitate its construction of that project. The "connectivity" between the fill of wetlands and the upland development in phase I is obvious through a number of examples in the administrative record, Plaintiffs claim, such as the definition of the project descriptions in the administrative record, (8 AR 3713, see also 8 AR 3730), and from other statements in the record. MTP has admitted to the Court that without section 404 authorization, it cannot proceed with Phase I of the Playa Vista project as planned. (See Miller Decl. ¶10) (submitted June 23, 1997). Plaintiffs claim that the declaration Of MTP's vice president, Robert Miller, submitted in opposition to a preliminary injunction motion by Plaintiffs on June 23, 1997, demonstrates that the freshwater system was designed to accommodate stormwater run-off not only from the

development of the 16.1 acres to be filled under the Permit, but also from significant additional phase I upland development as well. (Miller Decl. ¶¶ 7 & 10.)

Defendants argue that the impacts to which Plaintiffs cite are outside the limits of the Corps, jurisdiction. According to its own NEPA regulations, the Corps has discretion to limit the scope of the NEPA review process. The Corps argues that it properly and appropriately viewed the freshwater wetland system as merely being "complementary" to the entire Playa Vista project, and not integrated as in the nature of a single highway project. Therefore, it claims, the Corps properly limited the scope of the environmental analysis for the permit action as being limited to the impacts of the filling of the 16.1 acres of wetlands.

One of the first steps the Corps was required to take was to determine the scope of its analysis in determining whether to prepare an EIS.[13/] Although the Corps has "considerable

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[13/] The Corps' regulations provide:

> b. *Scope of Analysis.* (1) In some situations, a permit applicant may propose to conduct a specific activity requiring a Department of the Army (DA) permit (e.g., construction of a pier in a navigable water of the United States) which is merely one component of a larger project (e.g., construction of an oil refinery on an upland area). The district engineer should establish the scope of the NEPA document (e.g., the EA or EIS) to address the impacts of the specific activity requiring a DA permit and those portions of the entire project over which the district engineer has sufficient control and responsibility to warrant federal review.
>
> (2) The district engineer is considered to have control and responsibility for portions of the project beyond the limits of Corps jurisdiction where the Federal involvement is sufficient to turn an essentially private action into a is Federal action. These

discretion" in determining the scope of its analysis when assessing environmental impacts of a project, it must consider "connected or cumulative" actions together "to avoid dividing a project into multiple actions, each of which individually has an insignificant environmental impact, but which collectively have a substantial. impact." See Alpine Lakes Protection Soc. v. United States Forest Serv., 838 F. Supp. 478, 481 (W.D. Wash. 1993); Northwest Resource Info. Ctr. v. NMFS, 56 F.3d 1060, 1067 (9th Cir. 1995); Thomas v. Peterson, 753 F.2d 754, 758 (9th Cir. 1985).

The Corp is required to consider "connected actions" in a single EIS. See 40 C.F.R. § 1508.25(a)(1). Under CEQ regulations, "connected actions" means:

> (1) . . . that they are closely related -and therefore should be discussed in the same impact statement. Actions are connected if they:
>
> (i) Automatically trigger other actions which may require environmental impact statements. (ii)

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are cases where the environmental consequences of the larger project are essentially products of the Corps permit action.

> Typical factors to be considered in determining whether sufficient 'control and responsibility' exists include: (i) Whether or not the regulated activity compromises 'merely a link' in a corridor type project . . . . (ii) Whether there are aspects of the upland facility in the immediate vicinity of the regulated activity which affect the location and configuration of the regulated activity. (iii) The extent to which the entire project will be within Corps jurisdiction. (iv) The extent of cumulative Federal control and responsibility.

33 C.F.R. Part 325, App. B., § 7(b). - B(7)(b).

> Cannot or will not proceed unless other actions are taken previously or simultaneously. (iii) Are interdependent parts of a larger action and depend on the larger action for their justification.

40 C.F.R. § 1508.25(a)(i).

Defendants argue that the Corps had several reasons for not preparing an EIS for the entire Playa Vista project. Defendants note that the Playa Vista project consists of three phases - the freshwater wetlands, a salt marsh restoration, and the marina development. They claim that the three components are not a single action, but rather have independent utility and could exist without each other. Moreover, they are in different planning stages with varying schedules. (8 AR 3768.) Therefore, the Corps claims that the scope of the associated environmental analysis was properly narrowed to the permitted action, i.e. the filling of the wetlands. (8 AR 3767-69.) Further, the Corps pledged to address the impacts of the projects as a whole in subsequent NEPA documents, thus ensuring that the review of the impacts of the project will not be piecemealed. (8 AR 3769.)

Defendants and Plaintiffs both rely on Sylvester v. United States Army Corps of Engr's (Sylvester II), 884 F.2d 394 (9th Cir. 1989). In Sylvester II, the plaintiffs challenged the Corps' decision to grant a section 404 permit for the filling of certain wetlands to accommodate the construction of a golf course which was part of a planned hotel resort complex. Id. at 396-97. The Corps limited its NEPA review to the golf course alone, rather than evaluating the environmental impacts of the entire resort complex. Id. at 397. The Ninth Circuit upheld the Corps' decision, stating that the course and the larger development were more like "separate segments of chain" and

that the resort complex and the course could each exist without the other, "although each would benefit from the other's presence." Id. at 400.

The instant case is distinguishable from Sylvester II. Here, the developer's interest in the overall development hinges on the development of the wetlands portion, thus making the two connected actions. See National Wildlife Federation v. Whistler, 27 F.3d 1341, 1346 n.4 (8th Cir. 1994). In Whistler, the Eighth Circuit upheld the Corps' decision to consider, in isolation, the developer's request to fill wetlands in order to provide access from a residential development to the river, based on its determination that "the planned housing development site was located on uplands and therefore could proceed without a permit." Id. at 1345. Thus, the Corps did not consider the housing development to be part of the project for which the applicant requested the permit. Id. The court specifically distinguished, and reserved ruling on, however, the situation where "the developer's interest in an overall residential development hinged on the development of the wetlands portions." Id. at 1346 n.4 (citations omitted). Ninth Circuit law is in accord with this analysis. See Save the Yaak Comm. v. Block, 840 F.2d 714, 719 (9th Cir. 1988); Thomas, 753 F.2d at 758-59.

Here, the mixed-use development project and the freshwater system are "links in the same bit of chain." See Morgan v. Walter, 728 F. Supp. 1483, 1493 (D. Idaho 1989), and are thus connected actions which should have been considered together by the Corps in determining the environmental impact. The mixed-use development could not proceed in the manner it was planned without the filling of the wetlands as authorized under the Permit. Moreover, the EA specifically rejected the "no action" alternative because to do so would "eliminate crucial linkages in the applicant's proposed

local street grid system, compromising the achievement of the applicant's planning objective of a traditional town model as an alterative to suburban development and its dependence on automobile use." (8 AR 3731.) Further, the wetland fill would not be justified in the absence of the mixed-use development. Defendants' assertion that the subject of the permit action has independent utility and that it will proceed to construction and see a functional purpose regardless of the outcome of the remaining project phases is disingenuous. The fill of wetlands and the creation of the 51.1 acre system does not have "independent utility" such that Defendants would reasonably consider constructing it in isolation. See Thomas, 753 F.2d at 759-60. This case is thus more like Thomas than Sylvester II. In Thomas, the court found the building of a road to facilitate logging and the timber sales that would result from that logging had to be considered together because "the timber sales cannot proceed without the road, and the road would not be built but for the contemplated timber sales." Thomas, 753 F.2d at 758. The two were connected actions and needed to be addressed in the same NEPA document. Id.

Further, the impacts of the entire Playa Vista Project are intended to be mitigated by the freshwater system proposed under the permit, and to accomplish the goals of the project in other areas. Finally, "the freshwater system is specifically designed to treat urban runoff and control flood waters emanating from the upland developments." (8 AR 3728.) For these reasons, the Court does not agree with the Corps' characterization of the freshwater system as being merely "complementary" to the Playa Vista project and not integrated within it. The Corps should have analyzed the entire project as functionally interdependent. The fill of wetlands as provided for under the Permit and the overall development on the Playa Vista property are inextricably intertwined, and are "connected actions," under applicable regulations. See Thomas, 753 F.2d

at 759. Thus, the Corps' failure to consider them together was in violation of the requirements of NEPA.

The Court further finds that they should have been considered together as "cumulative actions." Cumulative actions are actions "which when viewed with other proposed actions have cumulatively significant impacts." 40 C.F.R. § 1508.25(a)(2). A "cumulative impact" is defined as:

> the impact on the environment which results from the incremental impact of the action when added to other, past, present, and reasonably foreseeable future actions regardless of what agency (Federal or non-Federal) or person undertakes such other actions. Cumulative impacts can result from individually minor but collectively significant actions taking place over a period of time.

40 C.F.R. § 1508.7.

"Substantial questions" were raised as to whether the fill of wetlands and the mixed-use development would have significant cumulative environmental effects. See Thomas, 753 F.2d at 759. Therefore, the Corps should have considered these impacts together.

b) The Corps' Decision Not to Prepare an EIS as to the Proposed Riparian System

Plaintiffs argue that even if the Court finds that the Corps properly limited the scope of its environmental analysis to the filing of wetlands, the Corps' decision not to prepare an EIS was nonetheless invalid. Plaintiffs note that in issuing the section 404 Permit, the Corps purported to mitigate the loss of wetlands at Ballona with MTP's 51.1 acre "freshwater marsh

riparian system." This system has two components: (1) a marsh/stormwater basin, and (2) a riparian corridor. (8 AR 3728.) Plaintiffs now charge that the Corps has taken MTP's assertions as to the environmental benefit of this program at face value, (see 8 AR 3546, 3564 (4/17/92 and 11/27/91 letters from MTP addressing environmental concerns)), and has failed to conduct any independent scientific inquiry. Plaintiffs claim that both the EA and the response to the public's comments contained therein were drafted almost verbatim from documents created by MTP's lawyers and consultants. (See e.g., 6 AR 2957; 5 AR 2090-2166, 2044.) This was improper, Plaintiffs argue, based on 42 U.S.C. § 4332(2)(D)(III) and Sierra Club, 701 F.2d at 1024-25. This failure occurred, Plaintiffs claim, "in the midst of a storm of protests by resource agencies, private biologists and ecologists (including the majority of MTP's own Biological Field Team) and the public."

An agency must prepare an EIS under NEPA if "the action significantly affects the quality of the human environment." 42 U.S.C. sec. 4332(2)(C); 40 C.F.R. sec. 1508.8. In making this determination, "CEQ [Council of Environmental Quality] regulations require the agency to consider both 'context' and 'intensity.'" Morgan v. Walter, 728 F. Supp. 1483, 1488 (D. Idaho 1989) (footnote omitted); 40 C.F.R. 1508.27.

> "Context" refers to the effect of an action society as a whole the affected region, the affected interests and the locality. 40 C.F.R. § 1508.27. "Intensity" refers to the severity of the impact.
>
> The specific factors the agency must consider in determining whether the effects of a project are significant include, inter alia, "the degree to which the possible effects on the human environment are highly

> uncertain or involve unique or unknown risks," and "the degree to which the effects on the highly quality of the human environment are likely to be highly controversial."

Morgan, 728 F. Supp. at 1488 (citing 40 C.F.R. § 1508.27(4), (5) (1987); Sierra Club v. United States Forest Service, 843 F.2d 1190, 1193 (9th Cir. 1988)).

NEPA is a process-oriented, not a result-oriented statute. Idaho Sporting Congress v. Thomas, 1998 WL 236975, *2 (9th Cir. May 13, 1998); Inland Empire Pub. Lands v. United States Forest Serv., 88 F.3d 754, 758 (9th Cir. 1996). NEPA's goal is two-fold: "(1) to ensure the agency will have detailed information on significant environmental impacts when it makes its decisions; and (2) to guarantee that this information will be available to a larger audience." Indian Empire, 88 F.3d at 758 (citing Robertson v. Mehow Valley Citizens Council, 490 U.S. 332, 349 (1989)). Thus, NEPA requires an EIS be prepared for all "major federal actions significantly affecting the quality of the human environment. . . ." 42 U.S.C. § 4332(c). Neither party disputes that the Permit authorized a major federal action. Thus the effects on the human environment are at issue.

As noted above, an agency may decide not to prepare an EIS if, after conducting an EA, it determines that the federal action will not significantly affect the environment. See 40 C.F.R. § 1508.9(a)(1); California Trout, 58 F.3d at 472. Moreover, "conditions mitigating the environmental consequences of an action may justify an agency's decision not to prepare an environmental impact statement." In re Shank, 792 F-2d 821, 829 (9th Cir. 1986) (citing Steamboaters v. FERC, 759 F.2d 1382, 1394 (9th Cir. 1985)).

"An agency must prepare an EIS if 'substantial questions are raised as to whether a project . . . *may* cause significant degradation of some human environmental factor.'" Greenpeace, 14 F.3d at 1332 (quoting LaFlamme v. FERC, 852 F.2d 389, 397 (9th Cir. 1987) (internal quotations omitted)). That certain significant effects will indeed occur need not be shown. Id. However, "if the plaintiff raises substantial questions whether a project may have a significant effect, an EIS *must* be prepared." LaFlamme, 852 F.2d at 397. The standard is thus whether "the plaintiff has alleged facts which, if true, show that the proposed project *may* significantly degraded some human environmental factor." Foundation for N. Am. Wild Sheep v. USDA, 681 F.2d 1172, 1177-78 (9th Cir. 1982).

Plaintiffs argue that an EIS should have been prepared as to the proposed Riparian System because: (1) the system will probably cause significant Adverse Environmental Impacts and (2)the System was and is extremely controversial. Plaintiffs discuss four allegedly significant adverse environmental impacts. Each will be discussed below.

i) The 26.1 Acre Marsh/Retention Basin's Alleged Displacement of Existing and Restorable Salt Marsh

Plaintiffs argue that the 26.1 acre marsh/retention basin and the 26 acre riparian corridor will displace and destroy existing and restorable coastal salt marsh. (7 AR 3365-66; 6 AR 2937[14]; 4 AR 1768.) The loss of the restorable salt marsh

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[14] Dr. Zedlar wrote a letter on behalf of the Pacific Estuarine Research Laboratory. She states that:

> Our recommendation is that freshwater wetlands should not be

habitat is extremely significant and problematic, Plaintiffs argue. (6 AR 2937; 1 AR 11; 2 AR 946.) Coastal salt marsh has been found to provide vital habitat for plants, mammal, bird, and fish species. (See 1 AR 11; 2 AR 946.) Plaintiffs contend that the unnecessary loss of any salt marsh habitat or restorable salt marsh lands was heavily criticized before the permit was issued and remains a problem today. (6 AR 2906 [15]; 6 AR 2935; 4 AR 1768; 7 AR 3109 [16]; 6 AR 2919.)

> constructed in areas that were formerly salt marsh. . . . It is inappropriate to label the construction of a freshwater marsh that will be fed by urban run off as a "freshwater marsh restoration." The project fails to comply with the most widely recognized definitions of restoration (cf. National Resource Council and Society for Ecological Restoration). . . . If this is considered a "restoration" project, then the goals should clearly be to replace the structure and function of wetlands that formerly occupied the site. In other words, the construction of a freshwater marsh would be a restoration failure.

(6 AR 2938.)

[15] In the paper written by Varnhagen entitled "Liz Varnhagen's proposed MILESTONES for evaluating PLAYA VISTA - Permit Application N. 90-426-EV," Varnhagen notes:

> Points of Contention that may impact schedule: Freshwater marsh
>
> > The resource agencies (and Corps Regulatory) are not convinced that a freshwater marsh should be part of the project because it is not replacing what was once there, nor what is being lost now. The freshwater marsh component is included because of the Settlement Agreement, of which none of the agencies were a part. It is an artificial system which requires long-term, high maintenance. The agencies would rather see MTP-PV develop an estuary system with more salt marsh incorporated into the design. The question of how mitigation credits will be figured also remains an issue.

Defendants note that Plaintiffs cite no law or regulations to support the position that the potential future, but currently non-extant values, i.e. a future salt marsh, should he protected from current projects. NEPA regulations require an examination of "the environment of the area[s] to be affected," not an examination of potential future environmental conditions which might be foreclosed. See 40 C.F.R. § 1502.15. Defendants also contend that Plaintiffs are confusing their desire to restore farmland to salt marsh, instead of freshwater marsh, with the requirement that the Corps should analyze the least-damaging practicable alternative to a proposed project. Defendants note that a "practicable alternatives" analysis is designed to find some alternative to construction altogether in wetlands. 40 C.F.R. § 6.302. In other words, the alterative analysis looks at the proposed "impact[s] on the aquatic ecosystem," not at impacts on some possible or potential future land use under some alternate construction project.

Defendants argue that if Plaintiffs are challenging the alternatives analysis, the record is replete with an adequate

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(6 AR 2906.)

[16] Dr. Barry A. Prigge of UCLA states:

> My foremost objection to their plan is the construction of a "freshwater marsh" west of Lincoln Blvd. This is nothing more than a flood control basin and a basin for cleansing run-off water before it is released into either the salt marsh or Ballona Channel. To convert this area, which can potentially be restored to a salt marsh, to a flood control basin or a freshwater marsh is ecologically irrational. . . . Freshwater marshes can be created almost anywhere. A saltmarsh, on the other hand, requires low flat areas close to the coast that permit it to be under tidal influence. These are not areas one can create artificially.

(7 AR 3109.)

alternatives analysis. (See 4 AR 2044-89; 4 AR 2063; 4 AR 2078.[17]) For instance, Defendants point out that the record "adequately documents the reasons why the particular project was selected over all other examined alternatives." (See 8 AR 3731.) The California Coastal Commission conducted an analysis of its own, which it filed on July 17, 1991. (7 AR 3234-3271.) The Court notes that "[t]o the extent that practicable alternatives heave been identified and evaluated under a Coastal Zone Management program [the California Coastal Commission]... such evaluation shall be considered by the permitting authority as part of the consideration of alternatives under the Guidelines." 40 C.F.R. § 230.10(a)(5). The California Coastal Commission concluded that "[t]he Proposed 52-acre freshwater wetland system at Ballona will create a valuable biological asset." (7 AR 3252.)

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[17] For example, in the practicable alternatives analysis submitted in July, 1991, one alternative considered was to "include the 27 acres now planned for the freshwater marsh as part of an expanded salt marsh." (4 AR 2078.) The analysis continues:

> First, this is a contrary to the goal established by the Ballona Wetlands Committee of creating a freshwater wetlands system in addition to the salt marsh restoration. Also, a major deficiency with this alternative is that the salt marsh would be flooded by storm water runoff whenever the Ballona Channel lacked capacity to receive the drainage discharge. In addition, there would not be a reliable source of freshwater in storage for controlled release to the salt marsh system.
>
> Another disadvantage of this alternative is that it would be less ecologically beneficial than the chosen alternative. Freshwater wetlands are in shorter supply in the coastal area of Southern California than are salt marsh wetlands. Additionally, there is synergistic value in having a freshwater system adjacent to the salt marsh system.

(4 AR 2078.)

Plaintiffs do not adequately respond to the issues raised by Defendants in their Reply papers. Based on the arguments presented, the Court does not find that the Corps, decision as to the 26.1 acre marsh/retention basin was arbitrary, capricious, or not in accordance with the law. The fact that a better alternative may have been available does not render an agency decision illegal. The Court is concerned with the process of the Corps' decision making and will not substitute its judgment for that of the agency.

ii) Untested Nature of Retention Basin

Plaintiffs argue that the creation of a retention basin to store and treat stormwater is a completely untested methodology and may not work at all as mitigation for the loss of habitat values elsewhere. (See e.g., 3 AR 1569-70 ("There are concerns regarding use of wetlands for non-point source pollution control. Little is known regarding urban runoff on wetlands associated biota.").) Every federal agency, and MTP's own Biological Field Team and members of the public, raised substantial questions regarding the functionality of the freshwater retention basin, Plaintiffs note. (See 4 AR 1813 (EPA); 4 AR 1776 (NMFS); 4 AR 1792 (USFWS); 8 AR 3683 (USFWS); see also 4 AR 1777, 1779, 1810, 1838, 1840, 1855; 7 AR 3109 and 3112; 8 AR 3365.) One main point made during public comment was that information and data necessary to undertake serious scientific scrutiny of MTP's proposal was completely lacking, Plaintiffs argue. Id. In response, Plaintiffs claim that the Corps, solely through MTP (see 5 AR 2090 et seq, 6 AR 3054-55 (MTP's attorney letter), ignored these comments and treated the freshwater retention basin as an "environmental benefit." However, even MTP's own consultants admitted before the permit was issued that they lacked the ability to respond to the important questions being

raised about the "freshwater marsh riparian system." (See, e.g., 4 AR 1798-99 (Barry Prigge letter, 2/4/91).)

Plaintiffs note that this system is expected to retain a high pollutant load from nearby urban runoff. (5 AR 2554-55; see also 4 AR 1798-99, 1807.) The FWS and EPA both recognized that MTP's proposal to construct artificial habitat within the retention basin was unsupportable. (4 AR 1813-15; see also 4 AR 1806-07[18]; 8 AR 3469-70, 8 AR 3679; 8 AR 3683.) Again, resource agencies, the public, and scientists informed the Corps that this proposal required additional studies and information to address its impacts of such a retention basin on the surrounding environment including the salt marsh, open space, and residential development. (4 AR 1798-99; 7 AR 3099-3100; 4 AR 1798; 4 AR 1801, 1803; 4AR 1814-15.) Plaintiffs argue that without a detailed analysis and EIS, the Corps and the public are unable to determine the ability of the system to "neutralize and reduce" the heavily pollutant load it will carry. (4 AR 1798-1800).

Defendants claim that Plaintiffs' allegations as to the Retention basin and its feasibility are unfounded. (Opp. at 37.) Defendants argue that the administrative record contains substantial evidence that supports the scientific determination that freshwater marsh system is viable and that the project can adjust for future conditions. This "substantial evidence" to

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[18] The California Native Plant Society stated:

> Unfortunately the program for which the permit application is being made is highly flawed in spite of the apparent participation of several widely recognized, qualified and reputable scientists in the project. . . . I cannot believe competent biologists were consulted during the evolution of the proposed design. (4 AR 1806-08.)

which Defendants cite consists of only: (1) what Defendants describe as "the California Coastal Commission's conclusion that the system is functional," as stated in its January 1, 1992, report (7 AR 3252-57); (2) a report prepared by a research group, "the Chambers Group,"[19] and to which the Corps refers the Court to support its assertion that "biologists [concluded] that the system will be viable" (6 AR 2682-2903, particularly pages 2775-79)[20]; and (3) another Chambers Group document, prepared in May 1991, which Defendants refer to as a "biological report discussing water needs for system, citing seven separate reports." (5 AR 2169-95.)

The Court has carefully examined the evidence presented and finds that the Corps' decision to issue the Permit given the untested nature of the retention basin was arbitrary, capricious, and otherwise not in accordance with the law. The California Coastal Commission Report does not support Defendants' claim that the proposed system would be functional. The report's conclusions are largely conditional on review of further materials. The other evidence to which Defendants cite do not support their conclusions.

iii) Permit Based on Incomplete EA

Plaintiffs argue that the Permit was improperly based on an incomplete EA, one that relied on mitigation evidence that did not exist at the time that the Corps issued the Permit. (Mot.

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[19] The Chambers Group is apparently a group hired by MTP to perform research relevant to this project. (See 7 AR 3116.)

[20] October 23, 1991, Report: Environmental Evaluation for Construction of Freshwater Wetlands system and Filling of Isolated Wetlands for the Proposed Playa Vista Project, prepared for the Corps by "the Chambers Group."

at 30.) As discussed above, when the final EA was certified on July 1, 1992, it contained a list of Special Conditions relating to the creation of the freshwater system, which were supposed to accompany the Permit. (8 AR 3782.) Plaintiffs argue that the EA "clearly relies on these conditions to ensure the project's compliance with the CWA section 404(b)(1) guidelines." (8 AR 3789.) Yet, as noted above, the Special Conditions in the EA, which referenced "attached" mitigation documents, were not included in the Permit's Special Conditions.

More specifically, the EA references "the attached revegetation plan that accompanies this permit." (8 AR 3784.)[21] This revegetation plan was to be a detailed program for implementing the freshwater system as mitigation for the entire Phase I mixed-use development - it was to "clearly identify project goals, methods and timing of plantings, irrigation regimes, distribution and densities of plans, and species mix." (8 AR 3783.) Further, the success of the mitigation during the first year was to be determined based upon this "attached" vegetation plan. (8 AR 3784). Finally, this "mitigation document" was to contain a description of key water quality parameters and a water quality monitoring section. (8 AR 3786.) Thus, Plaintiffs argue that the EA clearly contemplates the existence of a document which significantly clarifies and develops the relatively unexplained freshwater marsh. Moreover, Plaintiffs argue that although the Corps goes with some detail into the goals which the freshwater system is designed to accomplish, without this plan, any analysis or finding that the system will mitigate the significant adverse impacts of the mixed-use development is wholly speculation

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[21] Plaintiffs note that as of June 1, 1992, one month before the Permit was signed, the FWS was still requesting that all mitigation documents be completed and attached to the permit. (See 4 AR 3683, 8 AR 3683-90.)

and necessarily arbitrary and capricious. (Pltfs' Mot at 33) (citing LaFlamme, 852 F.2d at 400.)

Defendants claim that the EA was not incomplete and that the errors of two Corps' employees, Castanon and Varnhagen, caused the present confusion, as their declarations allegedly explain. However, the Court has carefully reviewed the moving and opposing papers, the declarations submitted therewith, and all other evidence submitted with respect to this motion for a reasoned explanation as to why the Corps allowed MTP to develop the mitigation plans after issuance of the permit, and did not require that they be attached to the Permit when it was issue and as to how the FONSI was issued without these plans. Such explanation is not extensively briefed by the Corps in their Opposition. Castanon explains in his declaration that "The Corps's decision to allow MTP to develop the comprehensive mitigation plan after issuance of the permit, but before the commencement of construction is clearly set forth in the decision document, the final permit conditions, and the District Engineer's letter dated June 5, 1992." The first of these documents is the EA that accompanied the Permit on July 2, 1992, the one that required that the mitigation documents be attached. (8AR 3780-81.) He then cites to the Permit itself, issued on July 2, 1992, where the Special Conditions do not require the attachment of the mitigation documents. (8 AR 3718-24.) Finally, he refers to the District Engineer's June 5, 1992, letter. (8 AR 3693-94.) This letter is a response to a June 1, 1992, FWS letter in which it expressed concerns over the Permit to be issued. (See 8 AR 3683.). The letter states that one of the "two important issues is the lack of an approved mitigation plan for the impacts associated with this development project. You promised the Fish and Wildlife Service early on in your tenure that permits were not to be issued without an acceptable wetland mitigation plan. Currently, the applicant does not have an approved mitigation

plan." (8 AR 3683.) The Corps responds to this letter by stating:

> My position is that this project is extremely important and visible, and substantial delays in our permit evaluation such as those caused by detailed review and approval of the mitigation plan, may cause great hardship to the applicant. Existing site conditions are degraded and this project has the potential to greatly improve and enhance wetland habitat on site. I see that the applicant has taken much trouble to plan a good project and it is important to give them our cooperation. My proposed special conditions were drafted carefully by my staff in collaboration with the applicant. I have comfort that all the required follow-up documents will be submitted responsibly and promise you that the Service will be an integral part of the review of these documents.

(8 AR 3693.)

This response does not suggest the type of review required by NEPA and suggests that the decision to not require the mitigation documents be attached was arbitrary, capricious, and not in accordance with the law. "Hardship to the applicant" is not the type of consideration that would warrant the agency's decision not to undertake a thorough review of the proposed project and its environmental effects when deciding not to issue an EIS. Moreover, Colonel Thomas' confidence that the applicant will submit all required documents does not explain how the Corps decided there would be no significant adverse environmental impacts without examining the mitigation plans that lead it to this conclusion. The Court thus does not question the decision which the Corps made, but rather "the process it employed to reach its decision." See ASARCO, 616 F.2d at

1159.

Moreover, a "position matrix" accompanying the Corps' February 24, 1992, Notice of Intent to Issue Permit, "describes the unresolved issues between the Corps and the resource agencies," and further leads to the Court to conclude that Defendants' decision not to require that attachment of the mitigation documents and to issue a FONSI without reviewing them was arbitrary, capricious, or otherwise not in accordance with the law. (8 AR 3348, 3365-67.)

The Corp' description of the issues reveal that it intended to issue the Permit even when the Corps had not worked out nor reviewed, among other documents and information, certain mitigation documents or success criteria. For example, the Corps defined one issue as:

> In general, the permittee will have to submit many more important documents to be reviewed and approved before project construction may commence, notably, identification of maintenance requirements, success criteria, weed removal regimes, salt marsh restoration plan, water quality certification, coastal zone certification, financial guarantees and identification of future responsible party, among others. It might be construed that the Corps is issuing this permit prematurely. It will provide a lot of extra work to the project manager to be reviewing the continual stream of the required documents in full consultation with the resource agencies *after* the permit is issued. Priorities change.

(7 AR 3366.)

The Corps then defined MTP's position on this issue,

stating only that the Corps notes that it expects MTP to fully cooperate with the Permit's Special Conditions, and that "[MTP is] most interested in getting the permit in hand as soon as possible." (7 AR 3365) (emphasis added). As to the agencies' positions, the Corps noted that:

> EPA, NMFS and USFWS will want to see a more detailed revegetation plan complete with species lists and planting methods and locations, irrigation regimes, etc. etc. prior to the issuance of the Corps permit. They have not been in on any part of this negotiation; this will be new material to them.

(7 AR 3366.)

This analysis by the Corps suggests that although the agencies were opposed to issuing a permit without mitigation documents attached, the Corps decided to issue the Permit. Yet, the record does not reveal how the Corps' decided to not require the mitigation documents be attached or adequately reviewed prior to issuance of the Permit.

Varhagen's November 2, 1992, memorandum only further illustrates the arbitrary manner in which the Permit was issued. It reveals that the Permit was issued with considerable uncertainty concerning the mitigation.[22/]

[22/] Defendants attack the Varnhagen 1992 memorandum to her successor, Noda, by claiming that it revealed her personal opinions, not the official position of the Corps regarding the permit. (Castanon Decl. ¶ 34.) This argument is unpersuasive. Varnhagen may have been off the project at the time that she wrote the memorandum, but this letter indicates her views of the project and its status at the time the Corps issued the Permit. This letter is not personal correspondence between Varnhagen and an acquaintance. It is an intra-agency memorandum explaining the status of an improper project under the agency's control. Moreover, Varnhagen was the person

As to the language requiring the attached documents, she states that "These attached documents do not exist yet and that is essentially the problem." (8 AR 3826.) She continues that

> So much of the proposed mitigation is in the conceptual phase even though the permit has supposedly been issued. I believe almost all elements that would contribute to a complete mitigation plan are covered in the conditions as *documents to be submitted and approved at a later date and prior to the construction of some phase of development*, but we [the Corps] have reviewed none of it so far .... USFWS never approved any part of this permit, they only backed down from the elevation process. They did have a potentially elevatable issue, however. The permit was issued without a mitigation plan that they had reviewed and agreed was satisfactory. This went against an earlier promise by Colonel Thomas to their Field Supervisor saying that permits would only be issued *after* USFWS

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who drafted the Special Conditions. (8 AR 3827.) The Corps cannot now claim that any view she has as to them should be dismissed as her "personal opinions" and not relevant to the Court's understanding of the process in which the Corps engaged in issuing the Permit.

Further, Varnhagen herself described the memorandum as "background information"/an editorial. (8 AR 3828.) The Court's consideration of this letter is thus permissible. The Permit was not finalized until April, 1992, and thus this memorandum could be considered part of the record. Even if it were extra-record material, a reviewing court may "go outside the administrative record" to "consider evidence relevant to the substantive merits of the agency action . . . for background information, . . . or for the limited purposes of ascertaining whether the agency considered all the relevant factors or fully explained its course of conduct or grounds of decisions." ASARCO, 616 F.2d at 1160 (citing Association of Pacific Fisheries, 615 F.2d at 811).

> had a chance to review and agree to the mitigation plan. . . . In short, none of the agencies have critically looked at the details of the proposed mitigation up to now.

(8 AR 3826-27.)

Varnhagen also discusses the "attached documents" language particularly:

> Special condition 2(c) includes an attempt to get at the revegetation aspect of those ever-elusive success criteria. There is reason to be skeptical about requiring 80% planting density for a hypothetical unreviewed revegetation plan which is not attached to this permit. . . .
>
> Condition 5(c) refers to an attached mitigation document also. I guess I had envisioned that a comprehensive mitigation plan that included revegetation plans, desired water quality parameters, monitoring and maintenance, and possibly even goals for success criteria would be attached to the permit at the time I drafted the special conditions.

(8 AR 3827.)

Varnhagen further illustrates the irrationality of issuing the Permit without proper review of the mitigation documents when she states: "without specific mitigation goals, how do you know what you're trying to accomplish? How do you design a monitoring plan to produce relevant information when you don't know what you need to know." (8 AR 3828.)

Finally, Varnhagen's closing "waffling

recommendations" are just that. Her suggested "resolution" of the discrepancy between the EA and the Permit's Special Conditions 2(c) and 5(c) suggest the arbitrary manner in which the Corps handled this issue:

> **My waffling recommendations**: We could adjust the language in 5(c)and 2(c) to delete the reference to "attached" mitigation documents. That would be the simplest course of action and the applicant/permittee would be immensely grateful. Or we could ask Sharon to continue compiling the proposed revegetation plan that was included in the permit application into a separate document to be included with this permit as though it has been accepted by the Corps preliminarily. Or we could circulate it to the agencies and ask for their comments --- all before the permit is finalized. (That might not be trivial, and consume a lot of time). . . . So I guess it is best to leave this permit in its highly conceptual state, and move on to the meaty stuff later.

(8 AR 3828.)

Thus, it appears that NMFS never approved any part of the permit, but only backed down from the elevation process, despite having a potentially elevatable issue. Moreover, the Permit was issued without specifics as to mitigation being worked out and critically analyzed. It is thus reasonable to conclude that the Corps issued the Permit without the appropriate analysis of the impacts or effectiveness of the mitigation measures. The agency is charged with taking the requisite "hard look" at environmental consequences. How it did this based on this underdeveloped Permit and EA eludes the Court.

Also unclear is whether and/or in what manner the

Corps solicited comments from the relevant agencies on the decision not to require the attached mitigation documents originally required.[23/] The Corps has not directed the court to where in the administrative record it substantiated its position to release MTP of the requirement to attach mitigation documents. The fact that the resources agencies apparently withdrew their objections to the issuance of the Permit does not explain the process by which the Corps decided to not require the attached mitigation documents or how the Corps issued the FONSI without the documents.

Thus, the Corps' decision to issue the Permit in July, 1992, was arbitrary, capricious and otherwise not in accordance with the dictates of NEPA. Support for the Corps' decision to issue the FONSI and EA without the attached mitigation documents is not in the administrative record.

iv) The "Freshwater Marsh Riparian System's" Impact on the Existing Salt Marsh in Areas B and D

Plaintiffs argue that the riparian system "will likely impact the existing salt marsh in Areas B and D and impede efforts to restore those areas." Plaintiffs outline why the system will have limited, if any, value in maintaining and restoring the Ballona ecosystem.

[23/] CEQ regulations require an agency to "involve environmental agencies, applicants, and the public, to the extent practicable," in the agency's preparation of the EA. 40 C.F.R. § 1501.4(b). Moreover, the Corps' own NEPA regulations provide for public notice of and public input into the agency's permit actions: "The district engineer will consider all comments received in response to the public notice in his subsequent actions on the permit application." 33 C.F.R. § 325.2(a)(3).

Defendants correctly note that the sole basis of Plaintiffs' assertions in this regard are the extra-record, post-decisional declarations of Drs. Mattoni and Zedler. As decided above, these declarations shall not be admitted into evidence to raise new issues unless they show that the Corps' decision-making process failed to consider certain relevant information. Plaintiffs cannot merely challenge the Corps' decisions with post-decisional analysis, nor re-argue positions already presented and not accepted by the Corps. Plaintiffs do not try to fit the arguments offered in this post-decisional analysis into one of the exceptions for augmenting the record. Thus, the Court will not consider them in this manner. Without evidence that the Corps failed to adequately consider the argument that the freshwater system will likely impact existing salt marsh in areas B and D, and impede efforts to restore those areas, the Court rejects these contentions as a basis for vacating the Permit.

v) Whether the Proposed Freshwater Marsh Riparian System Was Controversial Enough that an EIS Should Have Been Prepared

Plaintiffs argue that the proposed "freshwater marsh riparian system" has been the subject of a substantial and ongoing scientific and environmental controversy. (Pltfs' Mot. at 37.) NMFS, EPA, and FWS questioned whether the proposal is environmentally sound. (See 4 AR 1813 (EPA); 4 AR 1776 (NMFS); 4 AR 1792 (FWS); and 8 AR 3683 (FWS).) More vigorous critiques from the scientific community and the public accompanied the agencies' comments. (See, e.g., 4 AR 1798, 1810, 1838, 1840, 1855; 7 AR 3109 & 3112; 7 AR 3365.) Moreover, upon learning of MTP's plans to create an artificial system to act as what Plaintiffs describe as a "storm water catch basin," members of MTP's own Biological Field Team were

appalled. Several wrote highly-critical letters asking that the project not be approved absent further studies and information. (See 7 AR 3112 (Henrickson); 7 AR 3109 (Prigge); 4 AR 1749 (Prigge).)

Additionally, Drs. Henrickson, Prigge, and Mattoni, and Cheryl Conel arranged a dinner meeting with a member of the Corps' permitting staff, Liz Varnhagen, to contest the concept being advanced by MTP. (Mattoni Decl. ¶ 13.) Subsequently, both Drs. Prigge and Henrickson urged a scientific meeting with MTP, the Corps, and the resource agencies before the Corps made the permit decision. (7 AR 3347.) The Corps did not accept an additional meeting with them. (7 AR 3347.)[24/]

Plaintiffs argue that under these circumstances, the only proper course of action is to prepare an EIS to ensure that the scientific analysis is performed in the public eye and that all relevant impacts are identified in detail.

In evaluating the intensity or the severity of the impact of a proposed action, the "[d]egree to which the effects on the quality of the human environment are likely to be highly controversial" is one of several factors the Corps is required to consider under CEQ regulations. See 40 C.F.R. § 1508.27(b)(4); Northwest Envtl. Defense Ctr. v. BPA, 117 F.3d 1520, 1536 (9th Cir. 1997); Greenpeace Action, 14 F.3d at

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[24/] The February, 1992, note, does not clearly state that Defendants were trying to avoid comments as to the plan. It merely states that the recipient of the message should not meet with these opponents at this time as "they had a chance to [comment] during public notice period." It goes on to suggest that the Corps should proceed with issuing its Notice of Intent to Issue the Permit, and that a better time to meet may be afer receiving comments from resource agencies and before issuing the Permit. There is no indication in the record that these parties met again.

1333 (citing 40 C.F.R. § 1508.27(b)(4)(1991)) (citations omitted) ("The existence of a public controversy over the effect of an agency action is one factor in determining whether the agency should prepare [an EIS]"); Daniel R. Mandelker, NEPA Law and Litigation, at 8-102, § 8.07[11] (West 1995). If a "'substantial dispute'" exists as to a federal action's "'size, nature, or *effect*'" it is controversial. Id. (citing Wild Sheep, 681 F.2d at 1182 (quoting Rucker v. Willis, 484 F.2d 158, 162 (4th Cir. 1973))). However, "[o]pposition to a use, the effect of which is relatively undisputed" does not alone create a controversy. Hanly v. Kleindienst (II), 471 F.2d 823, 830 (2nd Cir. 1972) (emphasis added); Northwest Envtl. Defense Ctr., 117 F.3d at 1536. Thus, for example, neighborhood opposition to a proposed project about which no substantial controversy as to its effect exists, is not the type of controversy contemplated by the regulations. Northwest Envtl. Defense Ctr., 117 F.3d at 1536; NEPA Law and Litigation, at 8-103, § 8.07[11]. Moreover, "where 'virtual agreement exists among local, state, and federal government officials, private parties, and local environmentalists,' the criticisms of the plaintiff and its experts are not sufficient to demonstrate the existence of a public controversy." Greenpeace, 14 F.3d at 1334 (quoting Friends of Endangered Species, Inc. v. Jantzen, 760 F.2d 976, 986-87 (9th Cir. 1985)).

Defendants argue that Plaintiffs have failed to show the existence of a "substantial dispute." Defendants claim that all Plaintiffs show is that they, among others, are opposed to the activities authorized under the Permit, including the creation of the freshwater marsh system. Defendants argue that Plaintiffs rely mainly on objections to the Permit's issuance made by federal resource agencies early in the Corps' permit evaluation process. Yet, Defendants claim that the administrative record demonstrates that it considered, addressed, and resolved the issues and concerns underlying the objections of these agencies

as part of its permit evaluation process so that they decided not to object further to the issuance of the permit.

Based on a review of the administrative record, the Corps' decision not to prepare an EIS given the challenges to the feasibility of the Freshwater System/retention basin and to the documents upon which the corps relied in making its determinations was arbitrary, capricious and not in accordance with the law. Most significant is a letter by a former MTP biologist. Dr. James Henrickson, professor of botany, wrote to the Corps to express his concern about the proposed developments at Playa Vista in December, 1991. He served as a botanical consultant to MTP during the 1990-1991 biological survey of the site, and helped prepare data on the site. He attacks the documents submitted by MTP, and the analysis provided therein, referring to it as "biologically unsound and meaningless," among other criticisms. He also noted that biologist hired by MTP-PV who have worked on the project did not support the plan.

Henrickson was not alone in attacking the Corps' decision and the adequacy and reliability of the documents submitted by MTP, and upon which the Corps relied. Dr. Prigge also noted in a December 3, 1991, letter that:

> I believe that [MTP's] plans for Phase I of the project are poorly conceived and their reports are biased and misleading. Unless [MTP] make[s] some serious modifications to their plans, I recommend that you deny permits to proceed with the project.
>
> [As to the freshwater marsh] This is nothing more than a flood control basin. . . . To convert this area, which can potentially be restored to a salt marsh, to a flood control basin or a freshwater marsh is ecologically

irrational....

> With regard to the riparian corridor, [MTP's] estimation of water demand may be considerably underestimated. . . . They have pulled numbers out of thin air, mixed them with a few reasonable attempts to estimate water demand, and have presented them as proven facts. . . .
>
> The report on Biological Resources of Freshwater Systems by the Chambers Group is a disgrace. . . .
>
> After reviewing several documents that the MTP has had done for this project, I am amazed at how misleading and biased they are. For a project that is the largest and most visible development in the history of Los Angels, I think it is important that every step of this project be held to the same high standards that any other project would be required to meet. The volume of redundant material, the obfuscation of the facts, the lack of some crucial field data to verify some of their assumptions, the lack of well thought-out alternatives, and the biased approach are reasons that I believe some of these reports should be sent back for revision. How anyone can grant a permit on the plans presented when it is contrary to the view of almost all biologists familiar with the Ballona Wetlands or saltmarsh ecosystems is beyond me.

(8 AR 3109-3110.)

Defendants incorrectly assert that Plaintiffs rely "principally on the objections to the issuance of the permit made by the federal resource agencies early in the Corps's permit evaluation process." In fact, much of the opposition to which Plaintiffs cite is from sources other than the federal

agencies. (See 4 AR 1798 (Dr. Prigge letter), 1810 (Pacific Estuarine Research Laboratory), 1838 (Santa Monica Bay Restoration Project), 1840 (Joshua Society), 1855 (Sierra Club); 7 AR 3109 (Dr. Prigge Letter), 3112 (Dr. Henrickson letter)).

The Court is not in a position nor is it authorized to analyze the substantive merits of the criticism lodged against the reports upon which the Corps relied. However, the record reveals more than mere opposition to this project. It reveals a substantial dispute as to not only the size, nature, and effects of the project, but also as to the adequacy and validity of the documents upon which the Corps now claims it relied in making its determinations.

The Court also notes that "[t]he Corps's regulations do not require the Corps to undertake an independent investigation or to gather its own gather its own information upon which to base an EA." Friends of the Earth, 800 F.2d at 834 (citing Save the Bay, Inc. v. United States Army Corps of Engr's, 610 F.2d 322, 325 (5th Cir. 1980)). The Corps may base its EA "entirely upon information supplied by the applicant" and it may even be prepared by an outside consulting firm. Id. at 834-35 (ft. omitted) (citing 33 C.F.R. Part 230, App. B § 8(b); Save Our Wetlands, Inc. v. Sands, 711 F.2d 634, 642 (5th Cir. 1983)). Even so, the Corps appears to have not considered, in determining the significant impacts on the environment of the permitted activity, the substantial dispute as to the nature and effect of the activity.

4. Defendants' Motion for Summary Judgment

Defendants argue that they are entitled to summary judgment on Plaintiffs' NEPA claim because the Corps properly determined that it did not need to prepare an EIS before issuing

the Permit. They claim that the Corps: (1) adequately analyzed the environmental impacts of the Playa Vista development; (2) prepared an adequate cumulative impacts analysis; and (3) properly determined that the three phases of the Playa Vista project have independent utility. The Court **DENIES** Defendants' Motion for Summary Judgment based on its findings stated above that the Corps' decision to issue the Permit violated the procedural requirements of NEPA.

IV.
Conclusion

The Court **GRANTS** in part and **DENIES** in part Plaintiff' Motion to Augment the Administrative Record. The Court further **GRANTS** Plaintiffs' Motion for Summary Judgment on the grounds that the Corps impermissibly segmented its consideration of the environmental impacts of the project, failing to consider connected and cumulative actions. Even if the Corps' segmentation were proper, however, the Corps' decision to issue the Permit with only an EA and FONSI, and not the more detailed EIS, without certain mitigation documents and success criteria worked out before issuance, given the untested nature of the retention basin, and in the midst of substantial dispute as to the project's nature and effects, was arbitrary, capricious, and otherwise not in accordance with the law. The Permit is therefore rescinded and all construction activities on the permitted area shall cease unless and until the Corps complies with its NEPA obligations. Finally, the Court **DENIES** Defendants' Motion for Summary Judgment, given the Court's findings as to the failings in the NEPA process in regard to the Permit at issue in this action.

IT IS SO ORDERED.

s/ RONALD S.W. LEW

RONALD S.W. LEW
United States District Judge

DATED: June 19, 1998

No. CV 96-8407 RSWL [AJWx][Pltf's Motion to Augment the Admin. Rec.; Cross Motions for Summary Judgment]

(orders\[wetlands.npa]\p)

RELEVANT REGULATION OF THE COUNCIL ON ENVIRONMENTAL QUALITY

The relevant regulations of the Council on Environmental Quality, 40 C.F.R. 1500 *et seq.*, are:

Section 1501.4 Whether to prepare an environmental impact statement.

In determining whether to prepare an environmental impact statement the Federal agency shall:

* * *

(c) Based on the environmental assessment make its determination whether to prepare an environmental impact statement.

* * *

(e) Prepare a finding of no significant impact (§1508.13), if the agency determines on the basis of the environmental assessment not to prepare a statement.

Section 1508.7 Cumulative impact.

"Cumulative impact" is the impact on the environment which results from the incremental impact of the action when added to other past, present, and reasonably foreseeable future actions regardless of what agency (Federal or non-Federal) or person undertakes such other actions. Cumulative impacts can result from individually minor but collectively significant actions taking place over a period of time.

1508.8 Effects.

"Effects" include:

(a) Direct effects, which are caused by the action and occurs at the same time and place.

(b) Indirect effects , which are caused by the action and

are later in time or farther removed in distance, but are still reasonably foreseeable. Indirect effects may include growth inducing effects and other effects related to induced changes in the pattern of land use, population density or growth rate, and related effects on air and water and other natural systems, including ecosystems.

Effects and impacts as used in these regulations are synonymous. Effects includes ecological (such as the effects on natural resources and on the components, structures, and functioning of affected ecosystems), aesthetic, historic, cultural, economic, social, or health, whether direct, indirect, or cumulative. Effects may also include those resulting from actions which may have both beneficial and detrimental effects, even if on balance the agency believes that the effect will be beneficial.

Section 1508.9 Environmental assessment.

"Environmental assessment":

(a) Means a concise public document for which a Federal agency is responsible that serves to:

(1) Briefly provide sufficient evidence and analysis for determining whether to prepare an environmental impact statement or a finding of no significant impact.

(2) Aid an agency's compliance with the Act when no environmental impact statement is necessary.

* * *

(b) Shall include brief discussions of the need for the proposal, of alternatives as required by section 102(2)(E), of environmental impacts of the proposed action and alternatives, and a listing of agencies and persons consulted.

Section 1508.13 Finding of no significant impact.

"Finding of no significant impact" means a document by a Federal agency briefly presenting the reasons why an action * * * will not have a significant effect on the human environment and for which an environmental impact statement therefore will not be prepared.

* * *

Section 1508.25 Scope.

* * *

To determine the scope of environmental impact statements, agencies shall consider 3 types of actions, 3 types of alternatives, and 3 types of impacts. They include:

(a) Actions (other than unconnected single actions) which may be:

(1) Connected actions, which means that they are closely related and therefore should be discussed in the same impact statement.

* * *

(2) Cumulative actions, which when viewed with other proposed actions have cumulatively significant impacts and should therefore be discussed in the same impact statement.

* * *

(b) Impacts, which may be: (1) Direct; (2) indirect; (3) cumulative.

Section 1508.27 Significantly.

"Significantly" as used in NEPA requires considerations of both context and intensity:

* * *

(b) *Intensity.* This refers to the severity of the impact.* * *. The following should be considered in evaluating

intensity:

> (7) Whether the action is related to other actions with individually insignificant impacts. Significance exists if it is reasonable to anticipate a cumulatively significant impact on the environment. Significance cannot be avoided by breaking it down into small component parts.

Supreme Court, U.S.
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In the Supreme Court of the United States

WETLANDS ACTION NETWORK, *ET AL.*,

PETITIONERS,

V.

UNITED STATES ARMY CORPS OF ENGINEERS, *ET AL.*,

RESPONDENTS.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

RESPONDENT PLAYA CAPITAL COMPANY, LLC'S BRIEF IN OPPOSITION

Maureen E. Mahoney
J. Scott Ballenger
LATHAM & WATKINS
555 Eleventh Street, N.W.
Suite 1000
Washington, DC 20004-1304
Telephone: (202) 637-2200
Facsimile: (202) 637-2201

Robert D. Crockett*
Kathleen O' Prey Truman
Kathryn M. Davis
LATHAM & WATKINS
633 West Fifth Street, Suite 4000
Los Angeles, CA 90071-2007
Telephone: (213) 485-1234
Facsimile: (213) 891-8763

* Counsel of Record for Respondent Playa Capital Company, LLC

QUESTION PRESENTED

Whether the Ninth Circuit erred by holding that, in light of the facts reasonably found by the U.S. Army Corps of Engineers, the Corps' application of its own regulations was not arbitrary and capricious.

STATEMENT OF RELATED PERSONS

Neither Playa Capital Company, LLC, nor its predecessor in interest, Maguire Thomas Partners-Playa Vista, has a parent company or has issued shares of stock or partnership interests to the public.

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STATEMENT OF THE CASE

I. Procedural History

Maguire Thomas Partners-Playa Vista ("MTP-PV")[1] concurs with Petitioners Wetlands Action Network, et al.'s recitation of the Opinions Below and Jurisdiction. Petitioners' statement of the Constitutional and Statutory Provisions Involved fails to mention the controlling regulations of the U.S. Army Corps of Engineers, found at 33 C.F.R. Part 325, Appendix B § 7(b). The regulatory background and history of this case are accurately summarized, in relevant part, in the Court of Appeals' comprehensive opinion.

Since the Court of Appeals entered its opinion, Petitioners have filed several motions in the District Court and the Court of Appeals seeking various stays and injunctions pending this petition for certiorari, all of which have been denied. These motions are not strictly relevant to the issues presented here, but MTP-PV will discuss them in detail in its Opposition To Petitioners' Application For Rule 23 Stay Pending Petition For Certiorari, filed concurrently herewith.

II. Factual Background

MTP-PV concurs with the balanced summary of the relevant factual record contained in the Court of Appeals' opinion. MTP-PV takes exception to the factual

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[1] Respondent Playa Capital Company, LLC is the successor-in-interest to Maguire Thomas Partners-Playa Vista. For clarity and consistency, the developer is referred to as MTP-PV.

presentation of the Petition, as described in the remainder of this section.

MTP-PV began carefully planning this mixed-use development of the Playa Vista property, which covers more than a thousand acres in Western Los Angeles County, in 1979. (Petition at 5a). The vast majority of the planned development will occur on upland property within the jurisdiction of state and local environmental regulators. MTP-PV has worked hard to accommodate the concerns identified by those regulators and the environmental impact reports they have prepared, and its initial plans have been approved by the California Coastal Commission and the City of Los Angeles. (*See Id.* at 6a n.4).

MTP-PV's development plans for the Playa Vista property also include filling a total of 24.1 acres of federally delineated wetlands, for which MTP-PV requires a permit from the U.S. Army Corps of Engineers (the "Corps") pursuant to Section 404 of the Clean Water Act. (*See id.* at 6a).

With the approval of the Corps, MTP-PV divided the planned project into three phases for purposes of that federal review. (Petition at 7a-8a). As part of the first phase, MTP-PV applied in 1991 for a permit to fill 16.1 acres of federally delineated wetlands in connection with a larger (entirely state-regulated) project for 5 million square feet of office space, 13,000 residential units, and hotel and retail space. (*Id.* at 8a & n.6). Eight of these acres are man-made flood control ditches and degraded wetlands located in seventeen isolated patches. (*Id.* at 8a). The remaining eight acres were abandoned farmland; four of those acres will be restored as wetlands, and the other four acres will be used to create a berm around a planned new 51.1-acre freshwater wetlands system (*id.*) to serve the dual function as

mitigation for loss of the scattered 16.1 acres, as well as to provide flood control. The second phase of the Playa Vista project plans to restore 188 acres of salt marsh. (*Id.* at 7a). The third phase plans a marina and related development. (*Id.*)

The Corps issued an Environmental Assessment ("EA") and a Finding of No Significant Impact ("FONSI"), in lieu of an Environmental Impact Statement ("EIS"). (*Id.* at 11a). The Corps found that the division of the project into three segments did not constitute inappropriate piecemealing. (*Id.*) The EA considered the cumulative impacts that the project would have on surrounding areas, but concluded that development of the 16.1 acres within the Corps' jurisdiction would have no significant impact and that there would be no significant loss of habitat. The Corps also concluded that it did not have "sufficient control and responsibility" over the upland portions of the project to warrant preparing a federal EIS on the basis of those state-regulated portions, pursuant to the Corps' governing regulations. *See* 33 C.F.R. Part 325, App. B § 7(b)(1).

MTP-PV did prepare a full environmental impact report under state law for the larger project. In 1993, objectors challenged the project within the 30-day limitations period of the California Environmental Quality Act. They raised the same claims Petitioners raise here as to the propriety of the freshwater wetlands system.

Petitioners' lengthy prediction of dire environmental harm from the Playa Vista development (Petition at 5-7) is both irrelevant to the issues actually presented in their Petition[2] and a one-sided portrayal of the extensive factual

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[2] The Petition does not, for example, actually challenge the Corps' substantive determination that filling these wetlands will have no significant impact on the environment.

record developed in this lengthy environmental review process. MTP-PV does not believe that a point-by-point rebuttal of Petitioners' environmental claims would be appropriate here; suffice it to say that, as the Court of Appeals' opinion makes clear, MTP-PV's plans have been thoroughly vetted and approved by the proper state and local environmental regulators. (*Id.* at 6a n.4). And the Corps did not issue its EA and FONSI until after the concerns expressed about the project by the Environmental Protection Agency, the Fish and Wildlife Service, and the National Marine Fisheries Service – all organizations not known for their timidity in defending the environment and endangered species – were resolved. (*Id.* at 10a-11a).

The Petition also misstates the basis of the Corps' decision and that of the Court of Appeals. Neither held that the Corps, when making FONSI determinations, can or should ignore all environmental impacts caused by activities outside of its regulatory jurisdiction. The Corps has explicit regulations governing when such extra-jurisdictional impacts should be considered, and simply concluded that those regulations were not satisfied on the facts here. The Court of Appeals in turn held that the Corps did not act arbitrarily or capriciously in so concluding.

REASONS FOR DENYING THE WRIT

The Petition does not identify any issue that even remotely merits this Court's attention. The heart of this case is a factual determination by the Corps that the state-regulated upland portions of the Playa Vista development are not dependent upon MTP-PV receiving the federal wetlands permit at issue – and that, therefore, the environmental impacts caused solely by that upland development are not fairly characterized as impacts *of the*

Corps' decision to issue the wetlands permit. The Court of Appeals engaged in a factbound review of the administrative record and properly held that the Corps' action was consistent with the National Environmental Policy Act ("NEPA"), 42 U.S.C. § 4321 *et seq.*, and not arbitrary or capricious. The Court of Appeals did not announce a rule of law or legal standard that is inconsistent in any way with the decisions of this Court or any other Court of Appeals. The conflicts alleged by the Petition are illusory; the cases it cites generally applied the same legal principles as the Court of Appeals in this case, although to very different factual circumstances and often different governing regulations as well.

I. THE COURT OF APPEALS MERELY HELD THAT, IN LIGHT OF THE FACTS REASONABLY FOUND BY THE CORPS, THE CORPS' APPLICATION OF ITS OWN REGULATIONS WAS NOT ARBITRARY AND CAPRICIOUS

Contrary to the Petition's repeated implications, the Court of Appeals did not hold that the Corps need never consider environmental impacts outside the scope of its regulatory jurisdiction when assessing the need for an EIS. The Court of Appeals merely held that the Corps' factual findings were supported by the record, and that the Corps' application of its own regulations governing extra-jurisdictional impacts to those facts was not arbitrary or capricious. MTP-PV believes that a brief summary of the governing law and the decisions below will help to clarify the actual basis of the decisions that this Court is now being asked to review.

NEPA requires federal agencies to prepare an Environmental Impact Statement for all "major Federal actions significantly affecting the quality of the human environment." 42 U.S.C. § 4332(2)(C). In determining whether an EIS is necessary, the agency first prepares an EA, which briefly describes the need for, alternatives to, and environmental impacts of, the proposed Federal action. *See* 40 C.F.R. § 1508.9. If the agency determines in a properly issued EA that the proposed Federal action will not significantly affect the environment, it makes a "finding of no significant impact," and the requisite NEPA inquiry ends. *Id.* at § 1508.13. If, however, the agency determines that the proposed Federal action will significantly affect the environment, then it is obligated to prepare a more thorough EIS concerning the project. *See* 42 U.S.C. § 4332(2)(C).

The Corps determined in this case that its proposed "Federal action" (*i.e.*, issuing a Clean Water Act permit to MTP-PV covering approximately 16 acres of wetlands) would not have any significant impact on the environment, and therefore declined to prepare a full EIS. For purposes of that decision, the Corps obviously had to decide which portions of the proposed 1000+ acre, primarily state-regulated Playa Vista development are fairly attributable to the limited federal action it was contemplating.

The Corps *did not* hold that its consideration of environmental impacts was strictly limited to the 16 acres actually subject to its jurisdiction. Instead, the Corps properly applied its own regulations – which provide that in making FONSI determinations it should consider "those portions of the entire project over which the district engineer has sufficient control and responsibility to warrant Federal review." 33 C.F.R. Part 325, App. B § 7(b)(1). Those regulations explicitly provide that "[t]he district

engineer is considered to have control and responsibility for portions of the project beyond the limits of Corps jurisdiction where the Federal involvement is sufficient to turn an essentially private action into a Federal action. These are cases where the environmental consequences of the larger project are essentially products of the Corps permit action." *Id.* at Part 325, App. B § 7(b)(2). Those regulations are a manifestly reasonable interpretation of NEPA, as the Ninth Circuit held in *Sylvester v. U.S. Army Corps of Engineers* (*Sylvester III*), 884 F.2d 394, 399 (9th Cir. 1989).[3]

Applying those regulations to the particular facts here, the Corps determined that the upland portion of the Playa Vista Phase I development could occur "regardless of whether this permit application is granted" and was therefore not a product of the Corps' permit action. (Petition at 19a). The Court of Appeals reviewed the administrative record and held that the Corps' factual findings in this regard were amply supported by the record.[4] (Petition at 22a ("It appears that the project

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[3] To MTP-PV's knowledge, no other federal Court of Appeals has explicitly ruled upon the validity of these regulations as an interpretation of NEPA. However, the regulations largely codified earlier decisions of the Fifth Circuit and the Eighth Circuit holding that the Corps could limit its consideration to those areas of a larger (primarily non-federal) project that fell within its jurisdiction. *See, e.g., Winnebago Tribe of Nebraska v. Ray*, 621 F.2d 269, 273 (8th Cir. 1980); *Save the Bay, Inc. v. U.S. Army Corps of Engineers*, 610 F.2d 322, 327 (5th Cir. 1980).

[4] As the Court of Appeals properly recognized, the District Court was simply asking the wrong question when it focused on the fact that the overall Phase I development could not proceed precisely as planned without the permit. (Petition at 21a-22a). That will always be the case, or the developer would not be seeking the permit. The relevant question is whether the environmental impacts attributable to the upland development could occur whether or not the Corps issued the wetlands

certainly *could* proceed without the permit and, as the Corps notes, is currently proceeding without the permit.")). Acknowledging that the Corps' interpretation of its own regulations is entitled to substantial deference under this Court's decisions, *see Marsh v. Oregon Natural Resources Council*, 490 U.S. 360, 375-76 (1989), the Court of Appeals then held that the Corps' decision to limit its "significant impact" review to the 16-acre lowland area was, *on the facts of this case*, not arbitrary and capricious. (Petition at 23a).

II. THERE IS NO CONFLICT WITH A DECISION OF THIS COURT

The Petition asserts that the Court of Appeals' decision conflicts with this Court's opinion in *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332 (1989). It does not. If anything, *Robertson* supports the Court of Appeals' decision.

Robertson did not even address when an agency is required to prepare an EIS under NEPA, much less how to draw the appropriate line between the federally regulated and state regulated portions of a large project for purposes of a FONSI determination. *Robertson* involved an exclusively federal project for which an EIS was in fact prepared. The Ninth Circuit had adopted a number of substantive rules about what an EIS must contain, and this Court held that those requirements imposed by the Ninth Circuit were inconsistent with NEPA and failed to give proper deference to the relevant agency regulations. *Id.* at 353-59.

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permit. The Corps found that they could, and the Court of Appeals properly recognized that that finding is supported by the record.

In the course of its background discussion on the policies supporting NEPA, *Robertson* did observe in dictum that one purpose of an EIS is to discuss the impact of off-site development upon a federal project so that non-federal bodies have "adequate notice of the expected consequences and the opportunity to plan and implement corrective measures in a timely manner." *Robertson*, 490 U.S. at 350. The Petition seizes on that observation and asserts that "[i]f an agency is required to look at impacts outside its regulatory jurisdiction when preparing an EIS, then certainly it must look outside this jurisdiction when determining whether to prepare an EIS at all." (Petition at 22).

That spare proposition is the lynchpin of the Petition's entire argument, and the Petition does not include a single supporting citation for it – from this Court or any other. That omission is not surprising, because the proposition is in one sense a red herring and in another sense wholly inconsistent with the language and structure of NEPA. It is a red herring because, as discussed above, neither the Corps nor the Court of Appeals has ever suggested that an agency cannot "look at impacts outside its regulatory jurisdiction" when deciding whether a contemplated federal action will have a significant impact on the environment. The Court of Appeals' opinion, and the Corps' regulations, instead properly recognize that impacts outside of the agency's jurisdiction should be considered if, and only if, those impacts are fairly attributable to the contemplated federal action that *is* within the agency's jurisdiction as a factual matter so that "the environmental consequences of the larger project are essentially products of the Corps permit action." 33 C.F.R. Part 325, App. B § 7(b)(2).

Taken any farther than that, the analogy proposed by the Petition is simply inconsistent with the language and

structure of NEPA. Once an agency undertakes to prepare an EIS for a federal project, NEPA and its implementing regulations require the agency to cast a broad net and study possible consequences of later actions by unrelated, non-federal entities so that, as recognized in *Robertson*, those entities will have "adequate notice of the expected consequences and the opportunity to plan and implement corrective measures in a timely manner." *See Robertson*, 490 U.S. at 350. But the statutory trigger for preparing an EIS under NEPA is a "*Federal* action[] significantly affecting the quality of the human environment." 42 U.S.C. § 4332(2)(C) (emphasis added). The focus of that trigger is, of necessity, on the agency's own contemplated actions. The statute could not sensibly be read to require the agency to peer any farther into the future when making that initial, threshold determination than the Corps' regulations already require. Doing so would in fact require the preparation of an environmental impact statement before an agency could determine whether its action will require an environmental impact statement – which is, of course, precisely the import of the Petition's circular reasoning.

Nothing in *Robertson* undermines that conclusion. To the extent it is relevant at all, *Robertson* generally supports the Ninth Circuit's decision in this case because this Court in *Robertson* deferred to the federal agency's interpretation of its regulations. The Ninth Circuit below held that the district court erred by not deferring to the Corps in the determination of its scope of review, citing *Marsh v. Oregon Natural Resources Council*, 490 U.S. 360, 375 (1989), and *Robertson*, 490 U.S. at 359. "Given the deference that the agency's determination of its own jurisdiction is due, the Corps' decision to limit its review to the specific activity requiring the permit is not arbitrary or capricious." (Petition at 23a).

III. THERE IS NO CONFLICT WITH DECISIONS OF OTHER CIRCUITS

Petitioners erroneously contend that the Ninth Circuit's decision in this case conflicts with the holdings of various other Courts of Appeals, particularly the First Circuit's holding in *Sierra Club v. Marsh*, 769 F.2d 868 (1st Cir. 1985). There is no conflict.

A brief review of *Marsh* reveals that the First Circuit in fact applied essentially the same legal reasoning and principles as the Court of Appeals in this case. In *Marsh*, the Corps and the Federal Highway Administration were considering building a solid-fill causeway to connect a large island in Penobscot Bay, Maine to the mainland, as well as a substantial port facility on that island. The agencies determined that those federal actions would have no significant impact on the environment, in part because they declined to consider evidence that the federal project would enable and encourage the private development of the rest of the island.

The First Circuit reversed. The Court recognized that "agencies need not consider highly speculative or indefinite impacts" of their initial actions when deciding whether to prepare an EIS. *Marsh*, 769 F.2d at 878 (citing *Kleppe v. Sierra Club*, 427 U.S. 390, 402 (1976)). In *Marsh*, the First Circuit found, however, that "the record makes it nearly impossible to doubt that building the causeway will lead to further development of Sears Island" and that "the plans for further development are precise enough for an EIS usefully to take them into account." *Id.* at 878-79. Given that the private development plainly would not occur without the federal action, the First Circuit held that the agencies should have considered the likely impact of the planned

private development when deciding whether the federal action would have a significant impact on the environment.

The First Circuit's opinion in *Marsh* is not in any way inconsistent with the Ninth Circuit's analysis in this case. The distinction between the cases is, of course, factual. The heart of the First Circuit's decision in *Marsh* is its factual finding that private development of the island would not occur without the federal causeway, and that such development would certainly occur if the causeway was built. In this case, by contrast, the vast majority of the Playa Vista Phase I project can be built, and indeed a large segment of it had been under construction during the two and a half year duration of the district court's injunction, without the fill of 16.1 acres of federally delineated wetlands. Because the Corps reasonably found that the impact of the upland development in this case would occur whether or not it issued the federal permit, that impact is plainly not attributable to the Corps' decision. Using the rules of law discussed in *Marsh*, the First Circuit would have decided *Wetlands Action Network* in the same manner as did the Ninth Circuit.

Petitioners and the district court's decision place great weight on the fact that a portion of the Phase I project would need to be redesigned in the absence of the Section 404 Permit and that the filling of wetlands would not occur in the absence of the Phase I project. However, this connection is found in every private project requiring a Section 404 Permit, as the Ninth Circuit noted: "If this type of connection alone were sufficient to require a finding that an entire project falls within the purview of the Corps' jurisdiction, the Corps would have jurisdiction over all such projects [requiring permits] . . . ." (Petition at 21a). The critical issue, of course, is not whether the rest of the project would have to change somewhat absent the permit,

but whether it could still proceed in a way that would have the same general anticipated environmental impact even if the permit were denied. As the Corps found and the Ninth Circuit recognized, it is perfectly clear that the upland portion of Phase I of the Playa Vista project could (and did) proceed without significant alteration even in the absence of the federal permit.

Marsh has no rule of law which conflicts with the Ninth Circuit's decision. The Ninth Circuit's decision below rested upon facts that the larger Playa Vista project did not necessarily need the 16.1 scattered acres of wetlands (Petition at 19a-22a), that the state had performed a competent and full environmental review of the project (*id.* at 23a), that the various parts of the project had independent utility (*id.* at 27a), that the FONSI was based upon "relevant and substantial data" (*id.* at 30a), and that the Corps "took a hard look at the environmental consequences" of the project (*id.* at 31a). These are all fact-based issues. The Corps decided that development in the 16.1 acres was not so significant to the 650-acre project as to require an EIS to measure the larger state-approved project impacts. The Ninth Circuit agreed with this decision and properly deferred to the Corps' decision. Given the deference owed to an agency's interpretation of its regulations, this Court should not disturb the Ninth Circuit's decision.

Petitioners also cite *Sierra Club v. United States Forest Service*, 46 F.3d 835, 839 (8th Cir. 1995), and *Society Hill Towers Owners' Ass'n v. Rendell*, 210 F.3d 168 (3d Cir. 2000), for the proposition that an EA must consider "[w]hether the action is related to other actions with individually insignificant but cumulatively significant impacts." 40 C.F.R. § 1508.27(b)(7); *see also* 40 C.F.R. § 1508.7. These decisions and regulations define the

"cumulative impacts" of the project that must be considered in an EA. They do not speak to the prior question of the scope of the project (or "action") itself, which is the issue addressed by the Corps and the Court of Appeals in this case. See 33 C.F.R. Part 325, Appendix B § 7(b).

There are three types of impacts to be studied in an EA or EIS. These three impacts are direct, indirect and cumulative. *See* 40 C.F.R. § 1508.8; *Colorado Environmental Coalition v. Dombeck*, 185 F.3d 1162, 1176 (10th Cir. 1999).

Direct and indirect impacts are those which relate to the project itself. *See Friends of the Earth, Inc. v. U.S. Army Corps of Engineers*, 109 F. Supp. 2d 30, 36 (D.D.C. 2000) ("Direct impacts encompass those impacts that are 'caused by the action and occur at the same time and place'") (citing 40 C.F.R. § 1508.8(a)); 40 C.F.R. § 1508.8(b) (indirect impacts are "caused by the project").

Cumulative impacts differ from direct and indirect impacts. Cumulative impacts, by definition, are the impacts of other projects combined with the project's direct and indirect impacts. Cumulative impacts include "other past, present, and reasonably foreseeable future actions regardless of what agency (Federal or non-Federal) or person undertakes such other actions." 40 C.F.R. § 1508.7 (definition of cumulative impacts). There should be no dispute that cumulative impacts require the study of "other projects' potential cumulative environmental impacts in the relevant geographical area." *Mississippi River Basin Alliance v. Westphal*, 230 F.3d 170, 176 (5th Cir. 2000).

The "cumulative impacts" regulations are uncontroversial and were complied with here. The Corps analyzed the cumulative impacts associated with its contemplated action, and the Petitioners did not challenge

the adequacy of that cumulative impacts study. It was exhaustive.[5]

The dispute in this case is not over the adequacy of the Corps' cumulative impacts study under the CEQ regulations, but over whether the Corps properly applied its regulations which determine the scope of the federal project itself for purposes of NEPA review.

That antecedent question is answered by Appendix B of Part 325 of section 33 of the Code of Federal Regulations, which vests discretion with the Corps to determine whether, "the Federal involvement is sufficient to turn an essentially private action into a Federal action. These are cases where the environmental consequences of the larger project are essentially products of the Corps permit action." 33 C.F.R. Part 325, App. B § 7(b)(2). The Appendix plainly states that the degree of federal control over the project is the key determinant for the Corps' scoping decision:

> In some situations, a permit applicant may propose to conduct a specific activity requiring a Department of Army (DA) permit . . . which is merely one component of a larger project . . . . The district

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5 *See* 4 AE 1720 [upland impacts], 1713 [aesthetics], 1714 [traffic], 1715 [energy], 1715 [air quality], 1718 [noise], 1718 [historic properties], 1719 [land use], 1719 [economics], 1720 [water quality]; 6 AR 2808-67 [60-page study]; *see also* backup technical material at Supp. Exc. 2998-3008 [permit notice], 3009 [Caltrans traffic input], 3010-3013 [response to comments to the EPA about cumulative impacts on salt marshes], 3014-3017 [table of contents to report showing studies of cumulative, off-permit area impacts of geology, hydrology, air quality, biological resources, cultural resources, paleontological resources, land use, transportation, noise, aesthetics, public services, socioeconomics]; 3018-3023 [sample of cumulative impacts analysis: air quality], all filed before the Ninth Circuit.

> engineer should establish the scope of the NEPA document (*e.g.*, the EA or EIS) to address the impacts of the specific activity requiring a DA permit and those portions of the entire project over which the district engineer has sufficient control and responsibility to warrant Federal review. . . . The district engineer is considered to have control and responsibility for portions of the project beyond the limits of Corps jurisdiction where the Federal involvement is sufficient to turn an essentially private action into a Federal action.

33 C.F.R. Part 325, Appendix B § 7(b); *see also Sylvester III*, 884 F.2d at 398-99 (upholding formula of Appendix B and deferring to Corps' decision to limit direct and indirect impact analysis to scattered wetlands filling instead of the larger private ski resort project).

It is not enough to claim cumulative impacts of possible future projects as a means to trigger an EIS. *Airport Neighbors Alliance, Inc. v. United States*, 90 F.3d 426, 430 (10th Cir. 1996), examined the relationship between cumulative impacts and the need to determine that the project "actions were 'so interdependent that it would be unwise or irrational to complete one without the others.'" (Citation omitted.) It was, as is here, a fact-based examination. In *Airport Neighbors*, an EA was sufficient to study the impacts of a runway upgrade. It was not necessary to use an EIS to study the greater impacts of the future airport master plan because it "would result in 'a gross misallocation of resources, would trivialize NEPA and would diminish its utility in providing useful environmental analysis for major federal actions that truly affect the

environment.'" *Id.* at 431 (citation omitted). All that is necessary is for the EA to identify potential cumulative impacts, and then explain why an EIS is not necessary to consider them further. *See Fritiofson v. Alexander*, 772 F.2d 1225, 1234 (5th Cir. 1985) ("Assuming, arguendo, that the EA's discussion of cumulative impacts is inadequate, the court should have simply remanded the case for reconsideration of those impacts, thus leaving to the Corps the decision whether, when properly evaluated, they mandate preparation of an EIS or whether they can again be considered in an EA.") Significantly, the Corps has discretion under section 1508.25(a)(2) not to require an EIS if the small size of the federal participation justifies this decision.

In this case, it is error to use the sweep required for a cumulative impacts study (*i.e.*, other projects, state, federal and private) as a means to attack the Corps' prior decision as to the scope of the *federal* portion of the project. Rather, the Ninth Circuit here held that it was unnecessary to compel the preparation of an EIS to review non-federal impacts, and that an EA would suffice to analyze the direct, indirect and cumulative impacts of the *federal* project in light of the small footprint of federal jurisdiction. (Petition at 22a-23a).

As explained above, Petitioners' repeated efforts to demonstrate that agencies may sometimes be required to consider environmental impacts outside of their explicit jurisdiction are unnecessary. The Court of Appeals did not hold in this case that such consideration was categorically inappropriate. What the Court of Appeals actually held was that, in the specific context presented here, the Corps' consideration of impacts caused by parts of the project outside of its jurisdiction was guided and constrained by a Corps regulation directly on point, *see* 33 C.F.R. Part 325,

App. B § 7(b), and that the Corps' application of that regulation was not, in light of its reasonable factual findings, arbitrary or capricious.

Petitioners also cite *Vieux Carre Property Owners, Residents & Associates, Inc. v. Pierce*, 719 F.2d 1272 (5th Cir. 1983). The Fifth Circuit's holding is contrary to the position for which it is cited. The Fifth Circuit upheld an agency's decision to focus its review upon a single phase of many phases. *See Vieux Carre*, 719 F.2d at 1278-79. According to the court, "[c]onfronted with a project that had independent utility, the City properly determined that it should be assessed independently of future speculative phases." *Id.* at 1278. That determination, the Fifth Circuit observed, was reasonable and consistent with the court's prior holdings that "'NEPA does not require an agency to consider the possible environmental impacts of less imminent actions when preparing the impact statement on proposed actions.'" *Id.* (citation omitted). There is no principle of law in *Vieux Carre* with which the Ninth Circuit's opinion conflicts.

Thus, none of Petitioners' cited decisions conflicts with the Ninth Circuit's decision in this case. They either support, or do not apply to, the Ninth Circuit's decision. To the contrary, the Ninth Circuit's decision squares with a number of other decisions with respect to the specific issue of whether an EA and FONSI will suffice in lieu of an EIS when federal involvement is minimal. *See National Wildlife Fed'n v. Whistler*, 27 F.3d 1341 (8th Cir. 1994) (EA would suffice; the "'relationship required to be considered in determining reasonable and practicable alternatives need not be of such significance as would be necessary to "federalize" the entire project [for NEPA purposes]'" (quoting *Sylvester v. U.S. Army Corps of Engineers*, 882 F.2d 407, 410 (9th Cir. 1989) (alteration in original));

Sylvester III, 884 F.2d 394 (EA would suffice in lieu of an EIS where the Corps determined that its jurisdiction was only a small component of the larger project).

IV. THERE IS NO CONFLICT WITH THE REGULATIONS

Petitioners rely upon cumulative impacts regulations to briefly argue that the Ninth Circuit's decision conflicts with regulations of the CEQ implementing NEPA. (Petition at 25-27). Petitioners do not explain how the CEQ regulations are inconsistent with the Court of Appeals' decision, or with the Corps' regulations on which that decision is based. Petitioners also do not explain how or where this argument was presented and preserved in the lower courts, in light of its complete absence from the relevant section of the Court of Appeals' opinion.[6] Petitioners also cite no decision of any court that has addressed the issue. To MTP-PV's knowledge, the only federal Court of Appeals to have ruled on the validity of the Corps' regulations is the Ninth Circuit itself. *See Sylvester III*, 884 F.2d at 399. At best, therefore, this issue is novel, splitless, and likely defaulted. It also is not fairly embraced within the Question Presented identified by the Petition.

In any event, as explained above, there is no conflict between the "cumulative impact" regulations and the Court of Appeals' decision, which is based on a different set of regulations that address an antecedent issue. The Corps' decision as to the scope of its review is discussed in Appendix B of section 7(b) of Part 325 of section 33 of the

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[6] The Court of Appeals did discuss the CEQ regulations in the portion of its opinion that relates to the "segmentation" issue discussed below, but not in the section of its opinion that Petitioners challenge here.

Code of Federal Regulations and section 1508.25 of title 40 of the Code of Federal Regulations. Neither of those sections make cumulative impacts equivalent to the scope of federal jurisdiction. Section 1508.25 merely lists it as one factor to consider. In any event, as discussed above, the EA contained a comprehensive review of the project's cumulative impacts.

The Petitioners mention briefly the issue of segmentation. (Petition at 28). Other than to say that segmentation has been litigated "in dozens of cases," Petitioners do not explain how the Ninth Circuit's decision conflicts with other decisions, or how it is contrary to regulations. The Ninth Circuit found substantial evidence in the record to support the Corps' decision that the Playa Vista project's three phases were not improperly segmented "because each have independent utility and that [the Corps] therefore was not required to consider the environmental impacts attributed to the three different phases in a single NEPA analysis." (Petition at 25a). The Ninth Circuit held that the Corps properly followed section 1508.25.

In summary, there is no conflict with the regulations. The Corps properly determined that the various phases of the entire Playa Vista project were not "connected actions" or "cumulative actions" because they have independent utility. 40 C.F.R. § 1508.25.

V. THERE IS NO IMPORTANT FEDERAL QUESTION

This case does not raise an "important" federal issue. The Corps determined that the 16.1 acres of degraded, scattered wetlands were not of sufficient import to the 650-

acre project as to require an EIS to study the direct and indirect impacts of the larger private project. The Ninth Circuit took comfort with the fact that a state environmental impact report under the California Environmental Quality Act performed the very study Petitioners now demand for an EIS. (Petition at 23a). The Corps determined, and the Ninth Circuit agreed, that the Corps lacked sufficient federal "control and responsibility" over the entire Phase I project. Moreover, the Ninth Circuit's opinion does not conflict with any identified decision of this Court or any other Court of Appeals, and has little precedential value in light of the extremely factbound nature of its analysis.

CONCLUSION

For the reasons stated above, Playa Capital respectfully requests that this Court deny Petitioners' petition for a writ of certiorari.

Dated: June 11, 2001

Respectfully submitted,

Maureen E. Mahoney
J. Scott Ballenger
LATHAM & WATKINS
555 Eleventh Street, N.W.
Suite 1000
Washington, DC 20004-1304
Telephone: (202) 637-2200
Facsimile: (202) 637-2201

Robert D. Crockett*
Kathleen O' Prey Truman
Kathryn M. Davis
LATHAM & WATKINS
633 West Fifth Street, Suite 4000
Los Angeles, CA 90071-2007
Telephone: (213) 485-1234
Facsimile: (213) 891-8763
* Counsel of Record for Respondent Playa Capital Company, LLC

(3)

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In The

Supreme Court of the United States

WETLANDS ACTION NETWORK, *et al.*,

Petitioners,

v.

U.S. ARMY CORPS OF ENGINEERS, *et al.*,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF OF AMICUS CURIAE THE SIERRA CLUB IN SUPPORT OF WETLANDS ACTION NETWORK'S AND CALIFORNIA PUBLIC INTEREST RESEARCH GROUP'S PETITION FOR A WRIT OF CERTIORARI

RICHARD R. WIEBE
Counsel of Record
2140 Ninth Avenue
San Francisco, CA 94116
Telephone: (415) 665-8793

Counsel for Amicus Curiae
The Sierra Club

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

20 pp

QUESTION PRESENTED

(As stated in the Petition for Certiorari)

Whether the decision of the court of appeals upholding the Corps of Engineers' decision not to prepare an Environmental Impact Statement under the National Environmental Policy Act was erroneous because the court of appeals determined, contrary to decisions of this Court and other circuits, that the Corps did not need to consider, in making this determination, significant environmental impacts that will be caused by portions of the same project which are outside the Corps' regulatory jurisdiction.

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INTEREST OF AMICUS

Amicus the Sierra Club is a national nonprofit organization of approximately 600,000 members dedicated to exploring, enjoying, and protecting the wild places of the Earth; to practicing and promoting the responsible use of the Earth's ecosystems and resources; and to educating and enlisting humanity to protect and restore the quality of the natural and human environment. The Sierra Club's concerns encompass the protection and preservation of wetlands and other crucial habitats. The Sierra Club's concerns also extend to enforcement of the National Environmental Policy Act (NEPA) to ensure that the federal government properly considers all the foreseeable environmental consequences, direct and indirect, of its proposed actions.

The Club's particular interest in this case stems from the United States Court of Appeals for the Ninth Circuit's novel and unsupported restrictions on the scope of environmental scrutiny under NEPA. By holding that an agency need only consider those environmental consequences that are the direct result of the agency's actions, and not any that are the result of private actions made possible only by the agency action but outside its jurisdiction, the Ninth Circuit's new rule will cause many adverse but indirect environmental consequences of federal actions to escape review entirely. It will thereby thwart NEPA's goal of informed agency decisionmaking,

not only in wetlands cases but in many others categories of federal actions affecting the environment.[1]

REASONS WHY CERTIORARI SHOULD BE GRANTED

A. NEPA And Its Implementing Regulations Require Federal Agencies To Examine Both The Direct And Indirect Environmental Consequences Of Their Actions

The National Environmental Policy Act of 1969 ("NEPA," 42 U.S.C. § 4321 et seq.) represented a monumental shift in the process of federal decisionmaking. It was the political recognition of a fundamental ecological reality: the natural systems of the Earth are interdependent and interconnected, and when our actions touch any part of that web of life they touch the whole. As Congress said in enacting NEPA, it was "recognizing the profound impact of man's activity on the interrelations of all components of the natural environment." 42 U.S.C. § 4331(a). NEPA instructs federal decisionmakers to take account of this ecological reality by examining the environmental consequences of their proposed actions before acting, rather than discovering those consequences only after

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[1] All parties have consented to amicus the Sierra Club's filing of this brief. Pursuant to Supreme Court Rule 37.6, the Sierra Club states: No person or entity other than amicus the Sierra Club, its members, and its counsel made any monetary contribution to the preparation or submission of the brief. Counsel for petitioners Wetlands Action Network and California Public Interest Research Group reviewed a draft version of this brief but did not author any portion of it.

they have occurred: "Simply by focusing the agency's attention on the environmental consequences of a proposed project, NEPA ensures that important effects will not be overlooked or underestimated only to be discovered after resources have been committed or the die otherwise cast." *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 349 (1989).

To this end, NEPA requires federal agencies to examine and report on the "environmental impact" of proposed major federal actions. 42 U.S.C. § 4322(2)(C). The Council on Environmental Quality (CEQ) has issued regulations implementing this command. These regulations create a two-stage process for environmental analysis under NEPA. 40 C.F.R. § 1501.4.

First, the agency performs an initial environmental assessment (EA) to determine whether the possible environmental consequences of the proposed action are significant enough to justify a full-scale environmental impact statement (EIS). Depending on the results of the EA, either the agency goes on to prepare an EIS or, if the possible environmental consequences are so insubstantial that an EIS is not called for, it makes a "finding of no significant impact" ("FONSI"). In this way, "[t]he sweeping policy goals announced in . . . NEPA are thus realized through a set of action-forcing procedures that require that agencies take a hard look at environmental consequences." *Robertson v. Methow Valley Citizens Council*, 490 U.S. at 350 (internal quotation marks omitted). NEPA removes "the blinders to adverse environmental effects." *Marsh v. Oregon Natural Resources Council*, 490 U.S. 360, 371 (1989).

Importantly, the CEQ regulations implementing NEPA instruct that in considering the environmental effects of its actions a federal agency must consider not only an action's direct effects but also any indirect or cumulative effects. 40 C.F.R. §§ 1508.7, 1508.8. The definitions of indirect and cumulative effects each encompass effects caused by actions taken by private parties. 40 C.F.R. § 1508.7 (cumulative effects included those flowing from other actions "regardless of what agency (Federal or non-Federal) or person undertakes such other actions"); 40 C.F.R. § 1508.8 ("Indirect effects may include growth inducing effects and other effects related to induced changes in the pattern of land use, population density or growth rate, and related effects on air and water and other natural systems, including ecosystems.").

Inevitably, in applying NEPA and the CEQ regulations the question arises how proximate must a possible environmental consequence be to merit consideration either at the EA stage or at the EIS stage. Over the more than 30 years of NEPA's existence, federal agencies and courts have in the vast majority of instances used a practical and common-sense approach to answer this question. They have looked, as the CEQ regulations and the purpose of NEPA require, not only to the immediate and direct consequences of the proposed action but also to its indirect and cumulative consequences. Applying this requirement has commonly led agencies and courts to conclude that where private activities are not directly subject to federal regulation but nevertheless dependent upon and intertwined with the proposed federal action, the consequences of those private unregulated activities are indirect or secondary consequences of the federal

action and must be considered in order to gain a true and complete picture of the environmental consequences that will follow from the proposed federal action. *See, e.g., Fritiofson v. Alexander*, 772 F.2d 1225, 1245-49 (5th Cir. 1985) (Corps of Engineers violated NEPA in issuing wetlands destruction permit without considering cumulative impacts from other development projects); *Sierra Club v. Marsh*, 769 F.2d 868, 877-79 (1st Cir. 1985) (where proposed federal action was approval of a causeway and port facility on an island, NEPA required consideration of indirect environmental consequences of other, federally-unregulated private development that would likely occur on the island if causeway and port were built); *Davis v. Coleman*, 521 F.2d 661, 674-76 (9th Cir. 1975) (NEPA required consideration of environmental consequences of private development that would occur if highway interchange were built); *Friends of the Earth v. U.S. Army Corps of Engineers*, 109 F.Supp.2d 30, 40-42 (D.D.C. 2000) (Corps of Engineers violated NEPA in issuing permit for floating casinos without considering indirect and cumulative impacts of additional upland growth and development that presence of casinos would induce); *Alpine Lakes Protective Soc. v. U.S. Forest Service*, 838 F.Supp. 478, 482-483 (W.D. Wash. 1993) (Forest Service project to build road across national forest to making timber on private lands accessible for logging could only be properly evaluated under NEPA by considering environmental consequences of the private logging that the road would make possible); *accord, Robertson v. Methow Valley Citizens Council*, 490 U.S. at 339 (approving EIS that, "as required by Council on Environmental Quality (CEQ) regulations, *see* 40 CFR 1502.16(b) (1987), addressed 'off-site impacts that

each alternative might have on community facilities, socio-economic and other environmental conditions' ").

B. The Ninth Circuit Has Worked A Substantial Change To Existing NEPA Law In This Case By Creating A Novel "Regulatory Jurisdiction" Limitation To NEPA's Scope That Is Contrary To The Statute

Notwithstanding these requirements of NEPA, the Ninth Circuit ruled in this case that an agency's duty to scrutinize the environmental consequences of a proposed federal action is limited to only the direct and immediate consequences of the action. The developer here sought a permit under section 404 of the Clean Water Act (33 U.S.C. § 1344) from the Corps of Engineers to destroy wetlands in order to build Phase I of its mixed-use commercial and residential development project. The developer will destroy half the wetlands that are the subject of the permit in order to build a detention and treatment basin for polluted surface water runoff that will be created by its development of the uplands portion of the project. 8 AR 3728. Without the development of the uplands and the resulting creation of polluted runoff, there would be no reason or justification for filling the wetlands or creating the basin. The developer will destroy the other half of the wetlands in order to build the mixed-use development upon them; if the wetlands were preserved it would lose crucial linkages in its street grid system. 8 AR 3731. This destruction likewise is inextricably intertwined with the project as a whole, and will occur only because of the project.

Thus, destruction of the wetlands benefits the entire Phase I project and has no independent purpose or utility apart from serving the Phase I project, as the district court found and the Ninth Circuit affirmed. In the district court's words:

> The mixed-use development could not proceed in the manner it was planned without the filling of the wetlands as authorized under the Permit. . . . [T]he wetland fill would not be justified in the absence of the mixed-use development. . . . [¶] . . . [T]he entire project [is] functionally interdependent. The fill of wetlands as provided for under the Permit and the overall development . . . are inextricably intertwined . . . .

Pet. Cert. App. 64a-65a (opinion of the district court); *see also id.* at 21a ("The district court's determination that the project would not be able to proceed as planned without the permit and that the filling of the wetlands would not occur without the project is correct." [opinion of the Ninth Circuit]). Had the Corps denied the wetlands destruction permit, the developer would have had to change its plans significantly to preserve the wetlands and to deal with the polluted surface water runoff in some other fashion.

The Ninth Circuit ruled that, notwithstanding the benefits the wetlands destruction provides to the entire Phase I development, the Corps was not required to consider any environmental consequences of Phase I but only the direct consequences of the loss of the wetlands because only the wetlands were within the Corps' regulatory jurisdiction. On that basis, it upheld the Corps'

decision not to prepare an EIS, concluding that the direct effects of the wetlands loss alone were too insignificant to justify an EIS.

The narrow, straitjacketed approach of the Ninth Circuit in this case marks a major, unwarranted, and disastrous departure from the settled pattern of agency and judicial practice under NEPA. The Ninth Circuit ignored NEPA's command that federal agencies fully consider all the possible environmental consequences of a proposed action. Instead, it read into that broad mandate the unprecedented restriction that an agency need not consider any environmental consequence that does not directly stem from an action within the agency's jurisdiction.

As the Petition for Certiorari correctly explains in greater depth (at pp. 18-20), the Ninth Circuit's novel approach is an extreme and erroneous deviation from preexisting NEPA law. Nothing in NEPA, the CEQ regulations implementing it, or prior case law supports the notion that an agency's scrutiny need extend no further than the boundaries of its jurisdiction. To the contrary, those authorities all make clear that NEPA's environmental-consequences inquiry is a practical, real-world inquiry that focuses not on the formalities of agency jurisdictional boundaries but on the realities of how an agency's actions may possibly affect the environment, whether directly or indirectly through private actions linked to the agency's action.

The Ninth Circuit's error sprang from its conceptual confusion about the difference between a federal agency's regulatory jurisdiction and its much broader duty under

NEPA to examine the possible environmental consequences of its actions. The Ninth Circuit concluded that if the Corps were to consider the environmental consequences of all of Phase I of the development project it would somehow be asserting jurisdiction over all the activities of Phase I, jurisdiction which it lacks. (Pet. Cert. App. 22a-23a.)

The Ninth Circuit apparently reasoned backwards from the principle that an agency *must* consider the direct consequences of actions taken within its jurisdiction to the conclusion that an agency *cannot* consider any other consequences, including the consequences of private actions made possible by the agency's action but lying outside the agency's jurisdiction. This reasoning is, of course, fallacious. Although a federal agency must consider the direct environmental consequences of its actions, it does not follow that the agency is prohibited from looking at the indirect consequences of its action, including indirect consequences whose immediate cause is an action taken by a private party as a result of the agency action. Nor does it follow that simply by studying those indirect consequences the agency is asserting jurisdiction over them.

Here, for example, there is nothing inconsistent between the Corps' consideration of all the direct and indirect environmental consequences of Phase I of the developer's project, which has as a necessary and integral element the wetlands destruction the Corps has authorized, and a recognition that the Corps does not have jurisdiction over all the actions the developer proposes as

part of Phase I. Examining all the environmental consequences of Phase I – and not just the immediate consequences of the wetlands destruction – is not the equivalent of asserting jurisdiction over all the causes of those consequences.

More than just fallacious, the Ninth Circuit's reasoning is contrary to the commands of NEPA. NEPA was intended precisely to expand the field of vision of federal agencies to encompass all the environmental consequences of their actions, not just those consequences that are direct and immediate. NEPA draws no distinction, and it would be irrational to imply one, between direct consequences whose immediate cause is an action within an agency's jurisdiction and indirect consequences whose chain of causation includes not only the federal action but private actions taken in response to the federal action. A decision regarding the proposed action cannot be an informed one unless it fully considers both.

The novel approach taken by the Corps in this case and approved by the Ninth Circuit will have drastic adverse consequences, not only for thousands of wetlands in the vast expanse of the Ninth Circuit but also for a multitude of ecosystems nationwide if it is applied in other circuits and by other agencies. In many instances it will return us to the pre-NEPA world of federal decisionmaking, when decisionmakers routinely and myopically ignored any environmental consequences beyond the boundaries of the decision before them, no matter how certain it was that those consequences would flow from the decision.

C. Under The Ninth Circuit's Novel Approach, The Destruction Of Many Wetlands Will Escape Full Scrutiny Under NEPA

As this case demonstrates, under the Ninth Circuit's approach the destruction of wetlands in many instances will no longer trigger an EIS, no matter how great the adverse environmental consequences of the project for which they are being destroyed. Wetlands are some of the most diverse and productive habitats on Earth. They host rich communities of plants and animals. Wetlands-dependent species include not only those which spend their entire life-cycles in wetlands but also those dependent on wetlands for only a particular life stage or activity. Many species rely on wetlands as a juvenile nursery, as a breeding or nesting ground, as a hunting or foraging ground, or as a migratory or seasonal resting ground. U.S. FISH & WILDLIFE SERVICE, STATUS AND TRENDS OF WETLANDS IN THE CONTERMINOUS UNITED STATES 1986 TO 1997, at 10-11, 36 (2000) [hereafter WETLANDS STATUS AND TRENDS].

Wetlands are also one of the most extensively degraded categories of landforms in the nation. It is estimated that at the beginning of European settlement there were 221 million acres of wetlands in the area that became the 48 contiguous United States, and that at present only 105 million acres remain – less than half the original amount. WETLANDS STATUS AND TRENDS, 9. Some regions have suffered even greater wetlands losses: California, the state where this case originated, has lost over 90 per cent of its original wetlands. Zedler Decl., ¶ 2; SAVE SAN FRANCISCO BAY ASSOCIATION, PROTECTING LOCAL WETLANDS 1 (2000). Traditionally, wetlands abutting waterways have possessed great value for commercial and

industrial purposes, and many wetlands have been filled for these purposes. Boston, New York, Washington, Chicago, New Orleans, Seattle, San Francisco, and many of our other major cities and metropolitan areas contain large tracts of urbanized land that were once wetlands. Vast areas of wetlands have also been drained or filled for agricultural and silvicultural purposes. Much of this wetlands destruction was actively promoted by the federal government through the Swamp Land Acts (codified at 43 U.S.C. §§ 982-994), under which it transferred 65 million acres of public domain wetlands to the states, the majority of which was then drained and developed. U.S. DEPARTMENT OF THE INTERIOR, WETLANDS OF THE UNITED STATES – THEIR EXTENT AND THEIR VALUE TO WATERFOWL AND OTHER WILDLIFE (1956).

Given both the biological richness of wetlands and the large losses of wetlands habitat, it is not surprising that many of the species that are threatened or endangered are wetland-dependent. It is estimated that 43 per cent of all threatened and endangered species are dependent on wetlands. SAVE SAN FRANCISCO BAY ASSOCIATION, PROTECTING LOCAL WETLANDS 1 (2000). Of the 32 endangered species of the San Francisco Bay Area of California, for example, 23 depend on wetlands for critical habitat. *Id.* at 2.

As is true in this case, individual wetlands frequently are small in size and comprise a relatively small portion of the total area occupied by a development project. For example, the mean size of all non-forested freshwater wetlands in the United States is less than 8 acres, and the mean size of all forested freshwater wetlands in the United States is 21 acres. WETLANDS STATUS AND TRENDS, 33.

There are several reasons why this is so. First, localized hydrological and geological conditions often cause wetlands to exist in a dispersed and discontinuous state. Second, in many cases past development activities have destroyed some or most of the original wetlands at a particular location, leaving the remaining wetlands in a fragmented and reduced state. Third, wetlands often form a transitional interface between upland and deeper water habitats. This wetlands interface is often a relatively narrow band between larger areas of upland and deeper water.

Although wetlands often cover only a relatively small physical area, they are frequently hydrologically and biologically connected to the adjacent uplands. Because of these connections, actions modifying or destroying wetlands will often have ecological consequences extending beyond the boundaries of the wetlands themselves. In turn, development in the uplands can adversely affect both the wetlands on which the uplands border and the species that depend on the wetlands.

The Ninth Circuit's new rule will have a drastic effect on the scope of environmental scrutiny in cases where, as here, wetlands are to be destroyed as an integral part of a larger project. By limiting agency scrutiny to only those environmental effects occurring within the physical area subject to the agency's regulatory jurisdiction, the Ninth Circuit's rule will reimpose on federal agencies the blinders that NEPA was intended to remove. In wetlands permitting cases, this will cause the Corps of Engineers to limit its scrutiny, as it did here, to only those

environmental effects caused by the portion of the development occurring within the four corners of the affected wetlands. No matter how connected the wetlands development is with the development on the adjacent upland, the environmental consequences occurring from development outside the wetlands will be ignored. The result will be to severely circumscribe the EIS process, for when the environmental consequences of wetlands-destroying development projects are viewed through the narrow blinders crafted by the Ninth Circuit, many such projects will appear so benign that the Corps of Engineers will not require an EIS.

D. The Adverse Environmental Consequences Of Many Other Federal Actions Will Also Escape Full NEPA Scrutiny Under The Ninth Circuit's Approach

Wetlands permitting by the Corps of Engineers, however, is only one example of the many types of federal actions whose full environmental consequences will escape scrutiny under the Ninth Circuit's decision. Indeed, a moment's consideration reveals that many of the most significant environmental impacts of federal actions are indirect ones beyond the direct scope of federal regulation. For example, a completed federal highway by itself generates no air pollution. It is only the private, voluntary, and federally unregulated activity of driving on the highway that generates air pollution. Likewise, commercial and residential development made possible by a highway can be indirect but inevitable environmental consequences of its construction. That these effects are indirect, however, does not mean that

they are not causally connected to the federal action nor that they are too improbable or insubstantial to merit examination before the federal decisionmaker acts. *See, e.g., Davis v. Coleman*, 521 F.2d at 674-76.

CONCLUSION

The petition of Wetlands Action Network and California Public Research Interest Group for a writ of certiorari should be granted.

June 11, 2001

Respectfully submitted,

RICHARD R. WIEBE
Counsel of Record
2140 Ninth Avenue
San Francisco, CA 94116
Telephone: (415) 665-8793

Counsel for Amicus Curiae
The Sierra Club

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No. 00-1692

In the Supreme Court of the United States

WETLANDS ACTION NETWORK, ET AL., PETITIONERS

v.

UNITED STATES ARMY CORPS OF ENGINEERS, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

PAUL D. CLEMENT
Acting Solicitor General
Counsel of Record
JOHN C. CRUDEN
Acting Assistant Attorney General
ANDREW MERGEN
ANTHONY HOANG
MARK R. HAAG
Attorneys
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

20 pp

QUESTION PRESENTED

The National Environmental Policy Act of 1969 (NEPA), 42 U.S.C. 4321 *et seq.*, requires federal agencies to examine the environmental impacts of proposed federal actions. Regulations promulgated by the United States Army Corps of Engineers (Corps) specify the appropriate scope of NEPA analysis when the proposed federal action, such as obtaining a permit to fill federally delineated wetlands, is merely one component of a larger project that is not otherwise within the Corps' regulatory jurisdiction. Under those regulations, the scope of the NEPA analysis of a proposed federal action depends upon an examination of a number of factors, including the "extent of cumulative Federal control and responsibility" over the entire project. 33 C.F.R. Pt. 325, App. B § 7(b)(iv). The question presented is as follows:

Whether the Corps abused its discretion when it determined that its NEPA analysis of a permit authorizing the fill of 16 acres of wetlands should be based on the direct, indirect, and cumulative impacts of that federal action, rather than on the impacts of the entire project of which the federal action was only a small part.

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In the Supreme Court of the United States

No. 00-1692

WETLANDS ACTION NETWORK, ET AL., PETITIONERS

v.

UNITED STATES ARMY CORPS OF ENGINEERS, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-35a) is reported at 222 F.3d 1105. The opinion of the district court (Pet. App. 39a-92a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on August 21, 2000. A petition for rehearing was denied on January 10, 2001 (Pet. App. 38a). On March 30, 2001, Justice O'Connor extended the time within which to file a petition for a writ of certiorari to and including May 10, 2001, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

This case involves a challenge to a permit issued by the United States Army Corps of Engineers (Corps) to Maguire Thomas Partners-Playa Vista (MTP-PV). The permit authorizes MTP-PV to fill 16.1 acres of scattered, highly degraded wetlands, and to create a 51-acre freshwater wetland system to mitigate that fill. That federal action is a component of a much larger project—MTP-PV's construction of a multi-phase, mixed-use development on a 1000-acre property owned by MTP-PV. Following extensive consideration, the Corps determined that an environmental impact statement for the challenged permit was not required under the National Environmental Policy Act of 1969 (NEPA), 42 U.S.C. 4321 *et seq.*, and the Corps' regulations. The court of appeals upheld that determination as a proper exercise of discretion.

1. NEPA requires federal agencies to examine the environmental effects of proposed federal actions, and to inform the public of the environmental concerns that were considered in the agency's decisionmaking. *Baltimore Gas & Elec. Co.* v. *Natural Res. Def. Council, Inc.*, 462 U.S. 87, 97 (1983). Among other things, NEPA requires agencies to prepare an environmental impact statement (EIS) for any proposal involving a "major *Federal action[]* significantly affecting the quality of the human environment," and establishes the requirements of an EIS. 42 U.S.C. 4332(2)(C) (emphasis added). "NEPA does not, however, expand the range of final decisions an agency is authorized to make," and "does not expand an agency's substantive powers." *Natural Res. Def. Council, Inc.* v. *EPA*, 859 F.2d 156, 169 (D.C. Cir. 1988) (citing additional cases).

Accordingly, NEPA does not permit agencies to expand their regulatory jurisdiction.

The Council on Environmental Quality (CEQ) has promulgated regulations providing that an agency may prepare an environmental assessment (EA) to determine whether a proposed action is likely to have a significant impact on the environment. 40 C.F.R. 1501.3, 1501.4. The regulations define "major Federal action" to include "actions with effects that may be major and which are potentially subject to Federal control and responsibility." 40 C.F.R. 1508.18. If an agency finds that a proposed action will not have a significant effect on the quality of the human environment, no EIS is required. 40 C.F.R. 1501.4(b), 1508.13. A reviewing court may not substitute its judgment for that of the agency as to the environmental consequences of a challenged federal action. *Vermont Yankee Nuclear Power Corp.* v. *Natural Res. Def. Council, Inc.*, 435 U.S. 519, 555 (1978). Instead, the agency's determination whether to proceed with an EIS must be upheld unless it is arbitrary and capricious. *Id.* at 554-555; Pet. App. 16a-17a.

The Corps has its own regulations implementing NEPA, which were approved by CEQ. 33 C.F.R. Pt. 325, App. B § 7(b). In particular, the regulations provide that, when the activity requiring a permit is "merely one component of a larger project," the EA or EIS should "address the impacts of the specific activity requiring a [Corps] permit and those portions of the entire project over which the district engineer has *sufficient control and responsibility* to warrant Federal

review." *Ibid.* (emphasis added).[1]

In determining whether the degree of federal "control and responsibility" over a project is sufficient to require consideration of the environmental impacts of the entire project, and not just the activity requiring a permit, the regulations direct the Corps to consider the following factors:

> (i) Whether or not the regulated activity comprises "merely a link" in a corridor type project (e.g., a transportation or utility transmission project).
>
> (ii) Whether there are aspects of the upland facility in the immediate vicinity of the regulated activity which affect the location and configuration of the regulated activity.

---

[1] 33 C.F.R. Part 325, Appendix B § 7(b) provides:

> *Scope of Analysis.* (1) In some situations, a permit applicant may propose to conduct a specific activity requiring a Department of the Army (DA) permit (e.g., construction of a pier in a navigable water of the United States) which is merely one component of a larger project (e.g., construction of an oil refinery on an upland area). The district engineer should establish the scope of the NEPA document (e.g., the EA or EIS) to address the impacts of the specific activity requiring a DA permit and those portions of the entire project over which the district engineer has sufficient control and responsibility to warrant Federal review.
>
> (2) The district engineer is considered to have control and responsibility for portions of the project beyond the limits of Corps jurisdiction where the Federal involvement is sufficient to turn an essentially private action into a Federal action. These are cases where the environmental consequences of the larger project are essentially products of the Corps permit action.

> (iii) The extent to which the entire project will be within Corps jurisdiction.
>
> (iv) The extent of cumulative Federal control and responsibility.

33 C.F.R. Pt. 325, App. B § 7(b)(2).

The Corps' regulations include examples of the proper scope of NEPA analysis in various situations. 33 C.F.R. Pt. 325, App. B § 7(b)(3). For instance, the regulations state:

> If a non-Federal * * * industrial facility is proposed to be built on an upland site and the only DA permit requirement relates to a connecting pipeline, supply loading terminal or fill road, that pipeline, terminal or fill road permit, in and of itself, normally would not constitute sufficient overall Federal involvement with the project to justify expanding the scope of a Corps NEPA document to cover upland portions of the facility beyond the structures in the immediate vicinity of the regulated activity that would effect the location and configuration of the regulated activity.

Ibid. Similarly, in the case of a 50-mile electric transmission cable crossing a one and one-quarter mile-wide river that is a navigable water of the United States, the EA would require the agency to address the impacts of the specific cable crossing, and not the "origin and destination of the cable nor its route to and from the navigable water, except as the route applies to the location and configuration of the crossing," because those features of the project are not "within the control or responsibility of the Corps." *Ibid.*

The Ninth Circuit has upheld the Corps' regulations as "strik[ing] an acceptable balance between the needs

of NEPA and the Corps' jurisdictional limitations." *Sylvester* v. *Army Corps of Eng'rs*, 884 F.2d 394, 399 (9th Cir. 1989). And petitioners have not challenged those regulations in this case.

2. a. This case involves a 1000-acre parcel of property known as Playa Vista, which is located in Los Angeles, California, and contains 186 acres of federally delineated wetlands. Pet. App. 5a-6a. For more than two decades, MTP-PV has been planning to build a large-scale, mixed-use development on that property, combining housing, offices, retail stores, hotels, recreation areas, and open space in a design intended to reduce dependence on automobiles. *Ibid.* The proposed development has been the subject of close scrutiny by federal, state, and local regulators, as well as extensive environmental planning and permitting proceedings. *Id.* at 6a & n.4; Gov't C.A. Br. 8.

MTP-PV proposed to divide the overall project into three separate phases. Phase I of the project involves the development of approximately five million square feet of office space, 13,000 residential units, and retail and hotel space. Pet. App. 8a n.6. A small part of Phase I calls for the filling of 16.1 acres of federally delineated wetlands, and the creation of a 51.1-acre freshwater wetland system to mitigate the impacts of the project and provide stormwater management. The wetlands subject to Phase I have been substantially degraded from years of heavy industrial and agricultural use. Eight acres of the wetlands subject to Phase I are located on 17 isolated patches of land scattered across the Playa Vista property; the remaining eight acres will be used to create the freshwater wetland system (for which four of those acres will be restored to wetlands). *Id.* at 6a-7a, 8a. Phase II of the project provides for the restoration and expansion of a remnant salt marsh,

from approximately 160 to 230 acres. Phase III—which recently was combined with the proposed second phase—calls for the development of a marina and associated commercial and residential space. *Id.* at 7a.

The project was divided into those three phases for purposes of permitting. The permit at issue in this case governs only the filling of the 16.1 acres of wetlands in connection with the first phase of the project. At the time of the lower court proceedings in this case, MTP-PV had not submitted a permit application for either the second or the third phases of the project. The Corps has determined, however, that an EIS will be required in connection with the permit applications for those phases (which, as noted, have since been merged into one). 60 Fed. Reg. 20,975 (1995).

b. In August 1990, MTP-PV applied to the Corps pursuant to Section 404 of the Clean Water Act, 33 U.S.C. 1344, for a permit to fill the Phase I wetlands. After MTP-PV submitted an analysis of proposed alternatives to filling the wetlands, the Corps publicly announced its preliminary determination that an EIS would not be required for the proposed action, and invited public comment. Numerous members of the interested public, environmental groups, and pertinent state and federal resource agencies commented on a variety of issues in connection with MTP-PV's permit application, including the Corps' compliance with NEPA. Pet. App. 8a-9a.

In particular, the National Marine Fisheries Service (NMFS), the United States Fish and Wildlife Service (FWS), and the United States Environmental Protection Agency (EPA) (collectively, the "resource agencies") submitted comments raising certain concerns about the permit application and project in general. NMFS expressed concern about the decision to evalu-

ate the Playa Vista project in three separate phases and permit applications, and recommended that the Corps reconsider its preliminary determination that an EIS was not necessary. The FWS suggested in conclusory fashion that an EIS was warranted. EPA did not question the Corps' preliminary determination that an EIS was not required. Petitioners did not submit any comments. Pet. App. 9a.

In 1991, MTP-PV submitted to the Corps a response to the public comments, along with additional scientific studies on the proposed development. MTP-PV explained that an EIS was neither necessary nor appropriate because the three project phases had independent utility, were at different stages of planning, and were subject to different governmental jurisdictions. MTP-PV further explained that the wetlands fill constituted only a small portion of Phase I. Of the 5,025,000 square feet of office space, the 13,085 dwelling units, and the retail and hotel space in the proposed Phase I project, only 80,000 square feet of office space (less than 1.6 %), only 450 dwelling units (3.4 %), and none of the hotel and retail space would be built on federally delineated wetlands. Given the limited scope of the permitted action—especially relative to the entire project—MTP-PV asserted that the federal action for purposes of NEPA should not include the upland impacts of the Playa Vista project, and thereby bring the entire project within federal jurisdiction. Pet. App. 8a n.6, 9a-10a; see 5 Admin. Record (AR) 2118-2127.

In February 1992, the Corps completed initial drafts of the permit and EA, and notified the resource agencies that it intended to issue the permit approving the filling of 16.1 acres of wetlands as part of Phase I. After various meetings and exchanges of information

between the Corps, MTP-PV, and the resource agencies, the Corps issued a second notice of intent to issue the permit with new permit conditions, and the resource agencies dropped their objections to the permit. In July 1992, the Corps issued the permit (including the agreed-upon conditions), along with the associated EA and finding of no significant impact (or FONSI). Pet. App. 10a-11a; Gov't C.A. Br. 8-13 (discussing permitting process with federal and other authorities).

c. The EA contained a discussion of the comments received by the Corps and the numerous factors considered by the Corps in deciding whether to approve the permit, including possible alternatives to the Playa Vista project; the impacts of the project on water supplies, aesthetics, traffic and transportation patterns, energy consumption, and air quality; and other factors. The EA further discussed secondary and cumulative effects of the entire project on the surrounding area. Gov't C.A. Br. 14. The Corps determined, however, that "it did not need to include substantial consideration of the development in the uplands area as part of the NEPA review of [the] permit application because it found that such development was outside its jurisdiction." Pet. App. 11a.

The EA explained that MTP-PV's three-phase approach to the Playa Vista project was appropriate because of the independent utility of the project phases and the large size and multi-faceted nature of the project. In addition, the Corps explained that implementation of the entire project would be staged over several years and would depend on changing market conditions, diverse zoning controls, and permit authorizations required by various local government agencies. The Corps found that division of the project for permit

application purposes would help ensure that the application would not be so large as to obscure its individual components, and would not include future components that were still in the early planning stages and therefore not susceptible to meaningful consideration and comment. Gov't C.A. Br. 14-15.

The EA further determined that the proposed action would actually result in a net *increase* in wetland values, because, under the permit, 16.1 acres of highly degraded wetlands would be replaced with 51 acres of higher-value riparian and wetland habitat. The EA also found that, even if the Corps denied the permit, the development of the uplands would likely go forward, resulting in the isolation and destruction of the wetlands while increasing the traffic-related impacts from the project. The Corps concluded that the proposed permit action does not have sufficient impacts to warrant an EIS. Pet. App. 11a-12a; Gov't C.A. Br. 14.

d. After the permit was issued, "MTP-PV performed extensive filling, clearing, and grading in the wetlands in the permit area." Pet. App. 12a. Many of the wetlands covered by the permit have already been filled. Gov't C.A. Br. 15.

3. In December 1996, more than four years after the permit was issued and after substantial filling had taken place, petitioners filed this action, alleging that the Corps' issuance of the Phase I permit violated NEPA.[2] Petitioners sought revocation of the permit and a preliminary and permanent injunction enjoining construction activity on the site. The district court denied the request for a preliminary injunction. In June

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[2] Petitioners raised several additional claims under NEPA and the Clean Water Act. But petitioners subsequently abandoned those claims and they are not implicated here.

1998, however, the court granted summary judgment for petitioners. In particular, the court found that the Corps had violated NEPA by improperly limiting the scope of its analysis to the impacts of the activities covered by the permit rather than considering impacts from the upland development. The district court invalidated the permit and enjoined MTP-PV from any further construction activities in the area covered by the permit, but it denied petitioners' request for an injunction against further construction on the upland portions of the site. The parties filed cross-appeals. Pet. App. 12a-13a.

4. The court of appeals reversed the district court's decision to invalidate the permit and remanded with instructions to vacate the injunction. Pet. App. 1a-35a. The court explained at the outset that "[t]he Corps' decision to prepare an EA rather than an EIS is reviewed under the APA's arbitrary and capricious standard." *Id.* at 16a. Because the Corps' decision to grant the permit was consistent with both the Corps' regulations—which petitioners did not challenge—and the record, the court held that "[t]he Corps' determination of the scope of the NEPA review and its issuance of a FONSI was not arbitrary and capricious." *Id.* at 35a.

The court of appeals explained that, under the Corps' NEPA regulations, "where the activity requiring a * * * permit is 'merely one component of a larger project,'" the scope of the Corps' NEPA analysis depends upon a multi-factored determination whether federal "control and responsibility" exists over the portions of the project not subject to the permit. Pet. App. 17a (quoting 33 C.F.R. Pt. 325, App. B § 7(b)); see *id.* at 17a-19a. The court then concluded that the record supports the Corps' determination that the Phase I

permit is functionally independent of the rest of the project, and that the Corps "does not have independent jurisdiction over the parts of the Phase I development that do not require the filling of wetlands." *Id.* at 22a. Indeed, "Phase I encompasses development of approximately 600 acres, only 16 of which are subject to direct control by the corps through the permitting process"; "the project is not financed by federal money"; and "state and local, not federal, regulations control the overall design" of the project. *Ibid.*

The court of appeals explained that the district court's contrary approach would greatly expand federal jurisdiction over private development projects and enlarge the Corps' obligation to review the environmental impacts of such projects in a manner that is contradicted by the Corps' regulations:

> The linkage that the district court found between the permitted activity and the specific project planned is the type of "interdependence" that is found in any situation where a developer seeks to fill a wetland as part of a large development project. If this type of connection alone were sufficient to require a finding that an entire project falls within the purview of the Corps' jurisdiction, the Corps would have jurisdiction over all such projects including those which the Corps' regulations cite as examples of situations in which the Corps would not have jurisdiction over the whole project.

Pet. App. 21a (citing 33 C.F.R. Pt. 325, App. B § 7(b)(3)).

The court of appeals also rejected the contention that the potential environmental impacts of Phases II and III of the Playa Vista project must be considered together with the potential impacts of the permit

pertaining to Phase I in a single NEPA analysis. Pet. App. 24a-27a. Again, the court emphasized that courts owe "considerable discretion" to an agency's determination whether multiple actions are sufficiently connected to require that they be examined as part of a single EA under the CEQ regulations. *Id.* at 24a. Moreover, the court found that "[t]he record supports the Corps' conclusion" that each of the three phases has "independent utility," and they therefore are not "connected actions" for purposes of the CEQ regulations, *id.* at 24a-25a, and that the three phases are not "cumulative" actions under either the CEQ regulations or Ninth Circuit precedent. *Id.* at 26a.

ARGUMENT

The court of appeals unanimously and correctly determined that the Corps did not abuse its discretion in assessing the environmental impacts of the challenged permit based on the direct, indirect, and cumulative impacts of that permit, and not those of the entire Playa Vista project at large. That determination is supported by the extensive record in this case and squares with the scope of NEPA review called for by the Corps' regulations, which petitioners have not challenged. The court of appeals' fact-bound decision does not conflict with any decision of this Court or of any other court of appeals. Further review is not warranted.

1. The scope of the NEPA analysis undertaken by the Corps comports with the requirements of NEPA and its implementing regulations. As discussed above, NEPA requires an EIS for "major Federal actions significantly affecting the quality of the human environment." 42 U.S.C. 4332(2)(C). The CEQ's NEPA regulations define "major Federal action" to include "actions

with effects that may be major and which are potentially subject to Federal control and responsibility." 40 C.F.R. 1508.18. Similarly, the Corps' regulations—which were reviewed and approved by CEQ—provide that where the activity requiring a permit is "merely one component of a larger project," the EA should "address the impacts of the specific activity requiring a [Corps] permit and those portions of the entire project over which the district engineer has sufficient control and responsibility to warrant Federal review." 33 C.F.R. Pt. 325, App. B § 7(b).

Petitioners have not challenged the Corps' NEPA regulations and, as the court of appeals concluded, the record in this case supports the Corps' determination that, among other considerations, the lack of federal control and responsibility over the entire Playa Vista project justified the Corps' decision to limit its EA to the particular federal action at issue—*i.e.*, the permit allowing the fill of 16.1 acres of wetlands in connection with Phase I of the project. As the court explained, "Phase I encompasses development of approximately 600 acres, only 16 of which are subject to direct control by the corps through the permitting process." Pet. App. 22a. At the same time, the Playa Vista project is not dependent on the permit at issue (and in fact proceeded without it), the project "is not financed by federal money," and "state and local, not federal, regulations control the overall design" of the project. *Ibid.*

The Corps' regulations give two examples of situations in which the action requiring a Corps' permit (*e.g.*, building a dock or running a pipeline or power line across a river) is part of a larger project to be constructed on uplands. 33 C.F.R. Pt. 325, App. B § 7(b)(3). Although the permit activity in those examples would

not be justified in the absence of the rest of the project, the regulations provide that the upland portions of those projects should *not* be deemed to be within the control and responsibility of the Corps for purposes of establishing the scope of NEPA review. The record in this case supports the same conclusion. Indeed, as the court of appeals explained, if the type of connection relied upon by petitioners (and the district court) to establish federal control and responsibility over the entire Playa Vista project—a permit to fill 16 acres of wetlands as part of a much larger project—were sufficient to bring the project within the Corps' purview for purposes of NEPA, "the Corps would have jurisdiction over all such projects including those which the Corps' regulations cite as examples of situations in which the Corps would not have jurisdiction over the whole project." Pet. App. 21a.

More fundamentally, as discussed above, the Corps' determination that its EA should not extend beyond the federal activity that is the subject of the Corps' permit is entitled to substantial deference and is reviewable only for abuse of discretion. See *Vermont Yankee Nuclear Power Corp.* v. *Natural Res. Def. Council, Inc.*, 435 U.S. 519, 555 (1978); Pet. App. 16a-17a. Even if it were possible to second-guess the Corps' determination on the extensive record in this case, the court of appeals correctly determined that "the Corps' decision to limit its review to the specific activity requiring the permit is not arbitrary or capricious." Pet. App. 23a. That fact-bound conclusion does not warrant further review.[3]

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[3] Although the Corps determined that "it did not need to include *substantial* consideration of the development in the uplands area as part of the NEPA review of [the] permit application," Pet.

2. Petitioners contend (Pet. 22) that the court of appeals' decision conflicts with *Robertson* v. *Methow Valley Citizens Council*, 490 U.S. 332 (1989), arguing that *Robertson* "recognize[s]" that an agency "is required to look at impacts outside its regulatory jurisdiction when preparing an EIS," and therefore establishes that an agency is required to look at impacts "outside this jurisdiction when determining whether to prepare an EIS at all." That contention is without merit.

Robertson involved the question whether NEPA requires agencies to include in an EIS a fully developed plan to mitigate environmental harm, or "worst case" analysis of potential harm. 490 U.S. at 335-336. There was no question that the underlying federal action in that case—the Forest Service's issuance of a special-use permit for the operation of a 3900-acre ski resort on federal lands, *id.* at 338—was a major federal action requiring an EIS under NEPA. As a result, *Robertson* did not (and could not) decide how an agency should define the scope of the federal action for purposes of determining whether an EIS is required at all. With respect to that issue (*i.e.*, the one presented here), the Corps' regulations make clear that the Corps has no obligation to define its action to include non-federal actions—such as the construction of the upland portions

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App. 11a (emphasis added), the Corps' EA nonetheless discussed the environmental impacts of the project on water supplies, aesthetics, traffic and transportation patterns, energy consumption, and air quality, and other factors, as well as the secondary and cumulative effects of the entire project on the surrounding area. Gov't C.A. Br. 14. In addition, those portions of the project that do not fall within federal jurisdiction remain subject to state and local environmental controls, and have been and will be subjected to regulatory scrutiny.

of the development in this case—over which the Corps lacks "sufficient control and responsibility." 33 C.F.R. Pt. 325, App. B § 7(b). As discussed, petitioners do not challenge those regulations and *Robertson* itself underscores that an agency's interpretation of its own NEPA regulations is entitled to considerable deference. 490 U.S. at 358-359.

Furthermore, nothing in the court of appeals' decision (or the Corps' determination in this case) is inconsistent with the principle that an agency may be obliged to consider potential impacts that are beyond its jurisdiction in deciding whether to prepare an EIS. Indeed, the Corps' regulations (33 C.F.R. Pt. 325, App. B § 7(b)) require the Corps to consider the direct, indirect, and cumulative impacts—including extra-jurisdictional impacts—that would result *from its proposed action*: here, the issuance of the permit to fill 16 acres of degraded wetlands and creation of a 51-acre wetland system as mitigation. As the court of appeals concluded, the Corps satisfied those requirements in this case, in accordance with the approach established by its own regulations. Pet. App. 20a-23a. At the same time, however, the Corps is not obligated by NEPA or its implementing regulations to define challenged federal actions to include the actions of private parties that are otherwise beyond federal control and responsibility, and nothing in *Robertson* is to the contrary.

3. Petitioners allege (Pet. 22-25) that the court of appeals' decision also conflicts with the decisions of other circuits. That contention is similarly unavailing.

There is no conflict with *Sierra Club* v. *Marsh*, 769 F.2d 868 (1st Cir. 1985). That case was decided three years before the Corps' adopted the NEPA regulations utilized by it in determining the appropriate scope of the EA challenged in this case. See 53 Fed. Reg. 3120,

3121 (1988); 52 Fed. Reg. 22,518 (1987). In addition, *Marsh* is factually inapposite. There, the Corps and the Federal Highway Administration had approved construction of a causeway to, and a deep-water port on, a previously-undeveloped island in Penobscot Bay, Maine. The issue was whether the federal agencies were obliged to consider, as an indirect impact of their actions, the industrial development that would result from the causeway and port. The First Circuit answered that question in the affirmative, in part because those impacts would be caused by the federal actions. See 769 F.2d at 878 ("[T]he record makes it nearly impossible to doubt that building the causeway and port *will lead to* further development" on the island.) (emphasis added). In this case, by contrast, the court of appeals recognized that the upland impacts of the Playa Vista project could occur—and indeed, were occurring —even without the permit. Pet. App. 22a.

Nor does the decision below conflict with *Sierra Club* v. *Forest Service*, 46 F.3d 835 (8th Cir. 1995). That case involved a challenge to the Forest Service's finding that certain timber sales in a National Forest would have no significant environmental impacts, and turned in relevant part on whether the Forest Service's analysis of "connected" or "cumulative" actions was adequate. *Id.* at 837-838. The Eighth Circuit, following the Ninth Circuit's analysis in an earlier Forest Service case, held that the pertinent CEQ regulations (40 C.F.R. 1508.7, 1508.25) required the Forest Service to consider the impacts that anticipated future activities on adjacent private lands would have on the National Forest lands. 46 F.3d at 839 (citing *Resources Ltd.* v. *Robertson*, 35 F.3d 1300 (9th Cir. 1993)).

Petitioners argue (Pet. 24) that *Sierra Club* "clearly held that analysis of activities outside the jurisdiction of

the federal agency must be considered in determining whether to prepare an EIS." Petitioners, however, again confuse an agency's duty to analyze the potential impacts of the proposed *federal* action (even when those impacts would be beyond the Corps' jurisdiction) with an agency's obligation to include within the definition of federal action the actions of third parties that are beyond its jurisdiction. As explained above, under the Corps' regulations, the latter determination depends upon the degree of federal control and responsibility over the project at large. Petitioners suggest (Pet. 24) that the court of appeals' approval of the Corps' analysis of connected and cumulative actions was based on jurisdictional considerations. That is not so. The court's finding that the different project phases were not sufficiently connected to require a global EIS for the project was based on the pertinent CEQ regulations, the long-standing "independent utility" test, and Ninth Circuit case law, as applied to the extensive record compiled by the Corps. See Pet. App. 25a-27a.[4]

Society Hill Towers Owners' Ass'n v. *Rendell*, 210 F.3d 168 (3d Cir. 2000), is also distinguishable. The plaintiffs in that case argued that the Department of Housing and Urban Development (HUD) had failed to

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[4] Moreover, as discussed above, the court of appeals found that the record supported the Corps' conclusion that "the three phases of the project are not connected actions because each [has] independent utility." As a result, the Corps "was not required to consider the environmental impacts attributable to the three different phases in a single NEPA analysis." Pet. App. 25a. Similarly, the court found that Phases II and III need not be analyzed together with Phase I as "cumulative" actions, in part because the details and planning decisions regarding Phases II and III had not yet been completed when MTP-PV submitted its permit application. *Id.* at 26a-27a. See Gov't C.A. Br. 24-30.

consider the cumulative impacts of its approval of a grant funding development of a hotel and parking garage. *Id.* at 172, 180. Petitioners argue (Pet. 25) that *Society Hill* stands for the proposition that "impacts outside HUD's control must be considered under NEPA, even if they are not within HUD's jurisdiction, if they are virtually certain to be completed as in the present case." Even that characterization, however, does not conflict with the court of appeals' decision here. As explained above, the court of appeals' approval of the Corps' analysis of connected and cumulative actions was not based on jurisdictional considerations, but rather on its determination that the separate phases of the Playa Vista project were functionally independent. Pet. App. 24a, 26a-27a. In addition, whereas the cumulative impacts of the project in *Society Hill* were "virtually certain," the opposite was true here. As the court of appeals explained, at the time MTP-PV applied for the Phase I permit at issue, uncertainty clouded Phases II and III of the Playa Vista project, including whether those phases would receive approval from relevant federal, state, and local regulatory bodies. *Id.* at 27a.

Vieux Carre Property Owners v. *Pierce*, 719 F.2d 1272 (5th Cir. 1983), likewise does not conflict with the decision in this case. That case involves a straightforward application of the "independent utility" test and, if anything, underscores that the court of appeals' decision in this case is in step with the case law in other courts of appeals. As the Fifth Circuit explained:

> *Confronted with a project that had independent utility, the City properly determined that it should be assessed independently of future speculative phases.* Not only was the decision imminently [sic]

> reasonable under the facts before the City, it was entirely consistent with this Court's holdings that "NEPA does not require an agency to consider the possible environmental impacts of less imminent actions when preparing the impact statement on proposed actions." *South Louisiana Environmental Council, Inc. v. Sand*, 629 F.2d 1005, 1015 (5th Cir. 1980), *quoting Kleppe v. Sierra Club*, 427 U.S. 390, 96 S. Ct. 2718, 2730 n.20, 49 L.E.2d 576 (1976). As was the situation in *Environmental Defense Fund v. Marsh*, 651 F.2d 983 (5th Cir. 1981), "*we are here dealing with two projects that are historically distinct, one of which is proposed and the other still in the process of study and design. In that situation, NEPA does not yet require the [agency] to evaluate the environmental impact of the [second project].*" *Id.* at 999.

Id. at 1278 (emphasis added).

There is, in short, no conflict of authority in the lower courts on the narrow question presented, and this Court's review accordingly is not warranted.

4. Petitioners argue (Pet. 25) that the court of appeals' decision conflicts with the CEQ regulations. That is incorrect. The court of appeals specifically acknowledged and applied the pertinent CEQ regulations. Pet. App. 24a-25a. Petitioners' claim of a conflict with those regulations boils down to a disagreement with the court of appeals' application of the regulations to the record in this case. Petitioners' assertions (Pet. 27) regarding the importance of this case mischaracterize the court of appeals' decision. That decision breaks no new legal ground. The court of appeals correctly applied NEPA and its implementing regulations to the particular facts of this case, and concluded that the

Corps did not abuse its discretion in determining that the EA should be based on the federal permit action, and not the entire project of which that federal action was only a small and inessential part. That fact-bound determination does not warrant further review.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

PAUL D. CLEMENT
Acting Solicitor General[*]
JOHN C. CRUDEN
Acting Assistant Attorney General
ANDREW MERGEN
ANTHONY HOANG
MARK R. HAAG
Attorneys

JUNE 2001

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[*] The Solicitor General is recused from participation in this case.

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IN THE

SUPREME COURT OF THE UNITED STATES

WETLANDS ACTION NETWORK, *et al.*,
Petitioners,

v.

U.S. ARMY CORPS OF ENGINEERS, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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REPLY BRIEF

Bruce J. Terris*
(**Counsel of Record*)
Kevin O. Leske
TERRIS, PRAVLIK & MILLIAN, LLP
1121 12th Street, N.W.
Washington, D.C. 20005
(202) 682-2100
Counsel for Petitioners Wetlands Action Network and California Public Interest Research Group

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20001

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REASONS FOR GRANTING THE PETITION

1. *The Corps Did Not Follow Its Own Regulations.* Both the U.S. Army Corps of Engineers ("the Corps") and Playa Capital, LLC ("MTP-PV") rely on the Corps' regulations. Brief for the Federal Respondents in Opposition ("Fed. Opp."), pp. 14-15; Respondent Playa Capital Company, LLC'S Brief in Opposition ("MTP-PV Opp."), pp. 6-8. Their reliance is misplaced. As the Corps states (Fed. Opp. 14), "petitioners have not challenged" the Corps' regulations. Even though the cited regulations (33 C.F.R. Part 325, App. B, Section 7(b)) are of dubious validity, petitioners have not challenged them because the Corps clearly did not follow them.

According to the Corps' regulations, the Corps must weigh several factors in determining whether to prepare an environmental impact statement ("EIS") (33 C.F.R. Part 325, App. B, Section 7(b)(2)):

> The district engineer is considered to have control and responsibility for portions of the project beyond the limits of Corps jurisdiction where the Federal involvement is sufficient to turn an essentially private action into a Federal action. These are cases where the environmental consequences of the larger project are essentially products of the Corps permit action. Typical factors to be considered in determining whether sufficient "control and responsibility" exists include:
> (i) Whether or not the regulated activity comprises "merely a link" in a corridor type project (e.g., a transportation or utility transmission project). (ii) Whether there are aspects of the upland facility in the immediate vicinity of the regulated activity which affect the location and configuration of the regulated activity. (iii) The extent to which the entire

> project will be within Corps jurisdiction. (iv) The extent of cumulative Federal control and responsibility.

Thus, the regulations specifically require that the Corp consider impacts where "environmental consequences of the larger project are essentially products of the Corps permit action."

The district court found that the project was a product of the Corps permit action. It stated: "The fill of wetlands and the creation of the 51.1 acre system does not have 'independent utility' such that Defendants would reasonably consider constructing it in isolation" and the "wetland fill would not be justified in the absence of the mixed-use development." Pet. App. 65a. The court of appeals agreed: "The district court's determination that the project would not be able to proceed as planned without the permit and that the filling of the wetlands would not occur without the project is correct." Pet. App. 21a. As discussed in the Petition (Pet. 17-20), despite this explicit agreement with the central factual finding of the district court, the court of appeals then immediately stated that this type of interdependence is not important since "[i]f this type of connection alone were sufficient to require a finding that an entire project falls within the purview of the Corps' jurisdiction, the Corps would have jurisdiction over all such projects * * *." Pet. App. 21a-22a.

Thus, the Corps and the court of appeals relied entirely on subsection (iii) of the regulations involving the Corps' lack of jurisdiction over major parts of the project. In doing so, the Corps did not follow its own regulations in their entirety.

Subsection (ii) of the Corps' regulations is particularly applicable to this case. Aspects of the upland portion of the project in the immediate vicinity of the wetlands affect the location and configuration of the wetlands permit. The environmental assessment stated that preserving the wetlands would "eliminate crucial linkages in the applicant's proposed local street grid system, compromising the achievement of the

applicant's planning objective of a traditional town model as an alternative to suburban development and its dependence on automobile use." 8 AR 3731. In addition, the district court found that the "fill of the wetlands as provided for under the Permit and the overall development on the Playa Vista property are inextricably intertwined, and are 'connected actions,' under applicable regulations." Pet. App. 65a.

The Corps concluded in the EA that an EIS was not required. 8 AR 3769. In reaching this conclusion, the Corps determined that it "need not include substantial[1/] consideration of development in the uplands because development could occur in those areas regardless of whether this permit application is granted." *Ibid.* Thus, the Corps decided not to consider the impact of the upland development because "such development was outside its jurisdiction." Pet. App. 11a. The court of appeals explicitly upheld the Corps' decision on this basis. Pet. App. 23a. Since the Corps' regulations were not followed in their entirety, their validity is not directly implicated in this case.

The Corps cites (Fed. Opp. 5) examples from its regulations of the appropriate scope of NEPA analysis. The regulations state that the Corps need not consider an upland industrial facility when the only Corps permit relates to "a connecting pipeline, supply loading terminal or fill road." 33 C.F.R. Part 325,App. B, Sec. 7(b)(3). The regulations further state that the NEPA consideration of the upland facility does not extend "beyond the structures in the immediate vicinity of the regulated activity that would effect the location and configuration of the regulated activity." *Ibid.* However, this example does not support the Corps' determination in this case.

The uplands portions of the project in this case are in the immediate vicinity of the regulated activity (*i.e.* the filling

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1/In actuality, the Corps gave no consideration to the upland development because it based its Finding of No Significant Impact on the portion of the EA discussing only the wetlands. *See* Pet. 15.

of the wetlands and creation of a freshwater wetland system) and affect the location of the regulated activity. As the Corps recognizes (Fed. Opp. 6), there are 17 patches of wetlands "scattered across the Playa Vista Property," which comprise a total of 16.1 acres. The Corps specifically found in the EA that "the filling of these areas are [sic] for development of proposed mixed-use development and supporting infrastructure" (8 AR 3729) and that without the filling of these wetlands "crucial linkages" in the development would be eliminated (8 AR 3731). Thus, Corps regulations demonstrate that the impacts of the entire development should have been considered.

In sum, the Corps did not consider the factors explicitly set forth in the regulations in determining not to prepare an EIS. It relied entirely on subparagraph (iii) and perhaps subparagraph (iv), which relate to whether the Corps had jurisdiction. The Corps did not consider in any way subparagraph (ii) which is clearly relevant to the facts of this case. Thus, respondents cannot rely on the Corps' regulations as justifying the Corps' failure to prepare an EIS. On the contrary, the Corps' failure to follow its regulations and its adoption of the position that no harm need be considered outside its jurisdiction, further supports petitioners' contentions that the decision of the court of appeals was erroneous and that the issue is of great national importance.

2. *The Corps' Decision Involved an Error Law Which Is Not Entitled to Deference.* Respondents attempt to characterize this case as whether "the Corps did not abuse its discretion in assessing the environmental impacts of the challenged permit" (Fed. Opp. 13) and whether the Corps applied its regulations in an arbitrary and capricious manner (MTP-PV Opp. 4-5). Federal respondents also cite *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.*, 435 U.S. 519 (1978), for the proposition that the Corps' decision to consider the environmental harm only from activities within the Corps' jurisdiction "is entitled to

substantial deference and is reviewable only for abuse of discretion." Fed. Opp. 14. These arguments might be correct if the Corps had weighed a variety of permissible factors in making its decision. However, as the court of appeals made clear, the Corps based its decision solely on the ground of its lack of jurisdiction. Pet. App. 11a. This determination was a clear error of law in violation of the National Environmental Policy Act ("NEPA"), which is not entitled to deference.

Both the Corps and MTP-PV also suggest (Fed. Opp. 22; MTP-PV Opp. 22) that a writ of certiorari should not be granted because this case revolves around a "fact-bound" determination. On the contrary, the decision of the court of appeals was based on its legal conclusion that the Corps was not required to consider the environmental impacts of the project resulting from the components of the project that were outside its regulatory jurisdiction. Pet. App 23a. This holding makes the federal agency's regulatory jurisdiction controlling as to the impacts to be considered in fulfilling NEPA requirements. This was a legal determination which is entirely appropriate for review by this Court.[2/]

3. *The Court of Appeals Decision Conflicts with this Court's Decision in Robertson v. Methow Valley Citizens Council and Decisions of Other Courts of Appeals.* The Corps contends (Fed. Opp. 16) this Court held in *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332 (1989), that the Forest Service was required to consider in its EIS only the harm emanating from the part of the project within the Service's jurisdiction. *Robertson* involved a developer's application "for a special use permit to develop and operate its proposed 'Early

[2/]Contrary to the Corps' argument (Fed. Opp. 15), petitioners do not argue that the Corps has jurisdiction over the entire project. Instead, petitioners contend that when deciding whether to prepare an EIS, the Corps must consider impacts from the entire project, even though some impacts are outside its regulatory jurisdiction. NEPA requires a federal agency to examine the full environmental effects of its actions. This includes impacts that are outside its regulatory jurisdiction.

Winters Ski Resort' on Sandy Butte and an 1,165-acre parcel of land it had acquired adjacent to the National Forest." *Id.* at 338. In the chapter on "Environmental Consequences" of the EIS, "[a]s is true of other subjects, the discussion included an analysis of cumulative impacts over several years *resulting from actions on other lands as well as from the development of Sandy Butte itself* (emphasis added)." *Id.* at 339-340. The EIS specifically concluded that although the proposed developed of the ski area "will not have a measurable effect on existing or future air quality," the off-site development of private land "will have a significant effect on air quality * * *" (internal citations omitted)." *Id.* at 340. If federal agencies must analyze the impacts of off-site activities in EIS's, as in *Robertson*, they must consider the impacts of the same activities in determining whether to prepare environmental impact statements.

The Corps and MTP-PV argue (Fed. Opp. 19; MTP-PV Opp. 12) that the court of appeals' decision in this case does not conflict with *Sierra Club v. Marsh*, 769 F.2d 868 (1st Cir. 1985), because the First Circuit recognized that building the causeway and port would lead to further development but that in the present case development would occur regardless of the permit. However, the EA here explicitly stated that most of the scattered wetlands were being filled "for development of proposed mixed-use development and supporting infrastructure." 8 AR 3729. In addition, the EA said that "[t]he requested action *would result* in the implementation of the first of three applications for dredge/fill associated with development of Playa Vista (emphasis added)." 8 AR 3728. The Corps also specifically admitted in the EA that MTP-PV proposes to fill wetlands "in order to accomplish the goals of Playa Vista project in Areas B, C, and D." *Ibid.* Morever, the permit in Phase I included the development of the freshwater wetland system "to compensate for impacts associated with subsequent development phases including development in Area A." *Ibid. See* Pet. App. 7a. The fact that MTP-PV concluded

"there was no practical alternative way to accomplish its purpose of building" the development without filling the wetlands, underscores that filling the wetlands would lead to further development of Playa Vista. Pet. App. 8a. 8 AR 3731.

The Corps also argues (Fed. Opp. 20) that *Society Hill Towers' Ass'n v. Rendell*, 210 F.3d 168 (3d Cir. 2000), does not conflict with the decision in the present case. The Corps states that while "the cumulative impacts of the project in *Society Hill* were 'virtually certain,' the opposite was true here" since "at the time MTP-PV applied for the Phase I permit, uncertainty clouded Phases II and III" of the MTP-PV project. Fed. Opp. 20. However, the record shows that the upland portions of Phase I of the project were virtually certain to proceed. Pet. 8, 11-15; Pet. App. 11a; 8 AR 3767. Thus, at the various least, all the impacts of the upland development in Phase I should have been considered in determining whether to prepare an EIS. Morever, there is ample evidence that the other phases were not speculative. The EA recognized that MTP-PV's "requested action would result in the implementation of three applications" and the EA discussed the entire project. 8 AR 3728. There is no evidence in the record to suggest that MTP-PV did not plan to complete any of the later phases.

MTP-PV argues (MTP-PV Opp. 13-16) that *Sierra Club v. United States Forest Service*, 46 F.3d 835 (8th Cir. 1995), and *Society Hill Towers' Ass'n v. Rendell*, *supra*, involve only the proper content of EA's rather than scope of the project that must be considered in determining whether an EIS must be prepared. MTP-PV admits that an EA or EIS must consider three kinds of impacts from a project, direct, indirect and cumulative. Here, as petitioners have previously shown (Pet. 11-15), the EA did discuss the cumulative impacts of the entire project. There is no justification for an agency to discuss all the impacts of the project in an EA, but then ignore most of the impacts in determining that the project has No Significant Impact. The principle purpose of an EA is to provide the basis

for the agency's determination as to whether an EIS must be prepared. Simple common sense dictates that all the impacts of the project be considered in determining that the project has no significant impact and therefore an EIS is not needed.

The Corps argues (Fed. Opp. 19) that the court of appeals' decision does not conflict with the cases cited by petitioners cite because the Corps does not have an "obligation to include within the definition of federal action the actions of third parties that are beyond its jurisdiction." However, the actions which petitioners claim that the Corps were required to consider were not the actions of third parties, but, instead, were part of the same project and were vital to the viability of the project as a whole. If a federal agency must consider impacts of activities that are not even a part of the project under consideration and are not within the regulatory authority of the federal agency involved (*see* Pet. 22-24), it *a fortiori* must consider impacts of activities which are part of the same project, whether or not they are outside its regulatory authority.

4. *The Project Threatens Serious Harm to Wetlands.* Respondents claim (Fed. Opp. 10; MTP-PV Opp. 2-3) that the proposed freshwater wetland system would be beneficial, the wetlands are of limited value, and that much of the wetlands have been filled. The opinions of the courts below and the record do not support these statements.

First, the Corps says (Fed. Opp. 10) that "the proposed action would actually result in a net *increase* in wetland values, because it called for the replacement of 16.1 acres of highly degraded wetlands with 51 acres of higher-value riparian and freshwater wetland habitat (emphasis in original)." Fed. Opp. 10. The 51-acre freshwater wetland system, more properly labeled a pollution run-off and detention system,[3/] is highly controversial. There is sharp disagreement over its effectiveness as mitigation for the destruction of the saltwater

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[3/]The basin would be a shallow lake with a surrounding weed patch and would be unlikely to provide significant habitat values. Mat. Dec., para. 8.

wetlands. The court of appeals noted there were "many agency and public comments criticizing the freshwater system," including comments that the system was not feasible and would have harmful impacts on the environment. Pet. App. 28a. These concerns were expressed by MTP-PV's own Field Team Members and, most significantly, by numerous federal agencies, such as the Environmental Protection Agency[4/] (EPA); National Marine Fisheries Service (NMFS), and U.S. Fish and Wildlife Service (USFWS). Mattoni Dec., para. 13 (MTP-PV's Field Team); 4 AR 1813 (EPA); 4 AR 1776 (NMFS); 4 AR 1792 (USFWS); 8 AR 3683 (USFWS).

The district court found that MTP-PV had not demonstrated that the proposed system would be functional due to its untested nature and emphasized that "NMFS, EPA, and FWS questioned whether the proposal is environmentally sound." Pet. App. 85a. The district court concluded: "[t]he Court has carefully examined the evidence presented and finds that the Corps' decision to issue the Permit given the untested nature of the retention basin was arbitrary, capricious, and otherwise not in accordance with the law." Pet. App. 75a. The questionable and untested nature of the pollution run-off system seriously undermines the Corps' contention that the proposed action would be an environmental improvement.

Second, respondents (Fed. Opp. 6; MTP-PV Opp. 2) claim that the wetlands in this case are degraded. However, as discussed in the Petition (Pet. 6), the record shows that the wetlands can be restored. 6 AR 2937; 6 AR 2919. Indeed,

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[4/]The Corps states (Fed. Opp. 8) that "EPA did not question the Corps' preliminary determination that an EIS was not required." This statement is not supported by the record. In its response to the Corps' notice of intent to issue the permit, EPA stated that "[n]umerous contradictory and unclear statements in the SOF [Statement of Findings] and Special Conditions should be rectified" and then listed inconsistencies in the Corps' SOF. 8 AR 3470. EPA was discussing the part of the SOF that was intended "to justify why an EIS is not required." *Ibid.* Thus, EPA was questioning the Corps' determination that an EIS was not required.

MTP-PV, the developer, admits that reconstruction is possible. Opposition to Petitioners' Application for Rule 23 Stay, p. 12.

Third, the Corps states (Fed. Opp. 10) state that "[m]any of the wetlands covered by the permit have already been filled." However, Marcia Hanscom, Executive Director of Wetlands Action Network, one of the petitioners in this case, visited the area on June 12, 2001. She observed numerous wetland areas where the wetlands are intact and ponded water, wetland soil and wetland vegetation remain. Even several of the wetlands that were partially bulldozed several months ago retain water and soil characteristics of wetlands and some of these areas also retain vegetation. On several occasions when MTP-PV partially bulldozed areas at the site in the past, the vegetation has returned after a short time period when left alone.

As respondents' briefs make clear, the facts concerning the environmental harm (or, as respondents would have it, benefit) are in sharp dispute. However, this is precisely the reason why an EIS is essential. Under NEPA, this is not a decision for the courts. Instead, NEPA mandates that the agency make this decision based on the environmental analysis required by the statute.[5/]

CONCLUSION

For the foregoing reasons and those set forth in the petition, petitioners respectfully submit that the petition for a writ of certiorari should be granted.

Respectfully submitted,
Bruce J. Terris*
Kevin O. Leske

(**Counsel of Record*)
June 25, 2001

[5/]The Corps notes (Fed. Opp. 7) that the Corps has determined that an EIS is required for Phases II and III, which have since been merged. However, even if this EIS addresses impacts from the entire project, including Phase I, the harm from the Phase I development will have already occurred. NEPA requires the preparation of an EIS before an action is commenced.